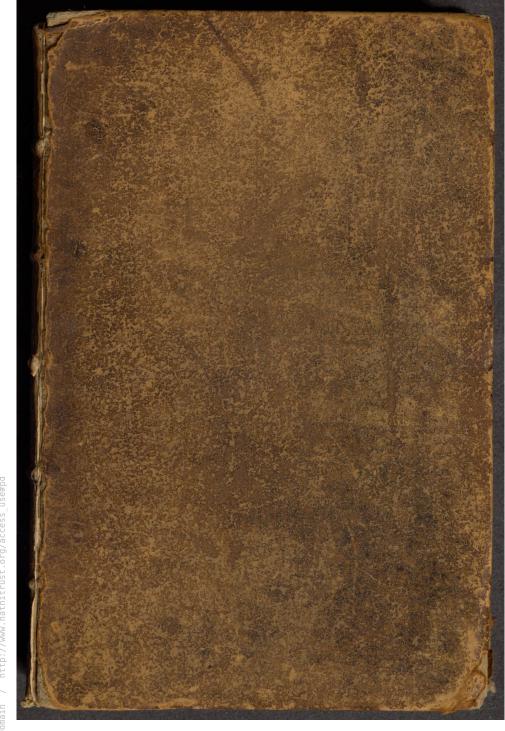
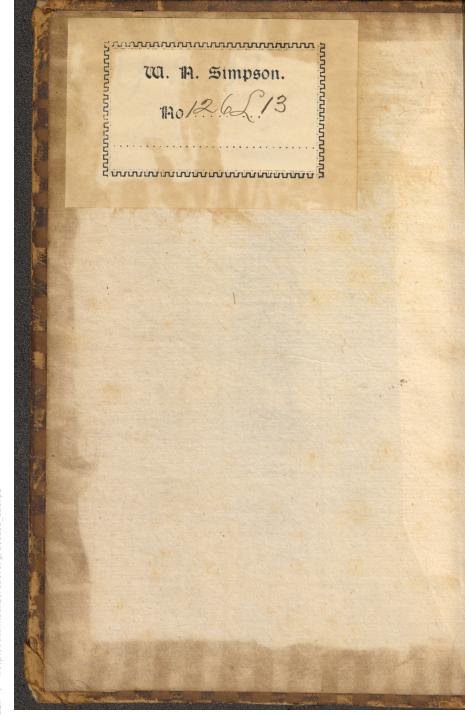
# I ILLINOIS

### Production Note

Digital Rare Book Collections
Rare Book & Manuscript Library
University of Illinois Library at
Urbana-Champaign
2019

Original from
UNIVERSITY OF ILLINOIS AT
URBANA-CHAMPAIGN





Digitized by
UNIVERSITY OF ILLINOIS AT
URBANA-CHAMPAIGN

Digitized by
UNIVERSITY OF ILLINOIS AT
URBANA-CHAMPAIGN

Original from UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

Digitized by UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

Original from UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

in Clear the greatest bloods of the Age. in 2 Vol. 17 be eng Llengman's Law, or Location ng tin W s sheet sila to encoded all to appeared the gloss to well private bus horizon test to the antiquity like Guide for Julices of the Potce, Church war uses and Overs feers. Wherein are explaned all the Brounts relation to that Subject sports with the Ancient and Modern I, av-Caleand

BOOKS printed for, and are to be fold by J. Walthoe in the Middle-Temple Cloysters, and at his Shop in Stafford.

1. A General Abridgment of the Common Law, Alphabetically digested under proper Titles, with Notes and References to the whole. By Knightley D'Anvers, of the Inner-Temple, Esq; Dedicated to the Lord Chief Justice Hole, with the Allowance of the Lord Keeper, and all the rest of the Judges.

2. The Law of Last Wills and Testaments, containing

Rules for the Construction of Last Wills.

3. The Compleat Sheriff; to which is added, the Office

of a Coroner. The 2d Edition.

4. The Modern Conveyancer, or Conveyancing improved; being a choice Collection of Presidents on most Occasions, drawn after the manner of Conveyancing, now in Use by the greatest Hands of the Age, in 3 Vol. The Third Edition, with large Additions.

5. The Clergyman's Law, or Compleat Incumbent, collected from the Common and Statute Laws relating to the Church and Clergy of England. By W. Watfon, Dr. of Laws. The 2d Edition with Additions, in 2 Vol.

6. The Justice of Peace his Companion, or a Summary of all the Acts of Parliament to 1712. whereby one, two, or more Justices of the Peace are authorized to act, not only in, but out of the Sessions of the Peace: With an exact Alphabetical Table. By Samuel Blackerby, of Grays-Inn, Esq;

7. Crown Law; or the Common and Statute Law of England, concerning Trials of High Treason, Misprisson of Treason, and in all other Crimes and Offences relating to the Crown; Alphabetically digested under proper Heads, and brought down to the Year 1710, with an exact Ta-

ole. By W. J. Barrister at Law.

8. Legal Provisions for the Poor; or a Treatise of the Common and Statute Laws concerning the Poor, either as to Relief, Settlement, or Punishment. Being a Methodical Guide for Justices of the Peace, Church wardens, and Overfeers. Wherein are explained all the Statutes relating to that Subject; with the Ancient and Modern Law-Cases and Resolutions of the Judges: And also many Precedents proper for such a Treatise. By S. C. of the Inner-Temple, Esq;

THE

## HISTORY

AND

## ANALYSIS

OFTHE

# Common Law

OF

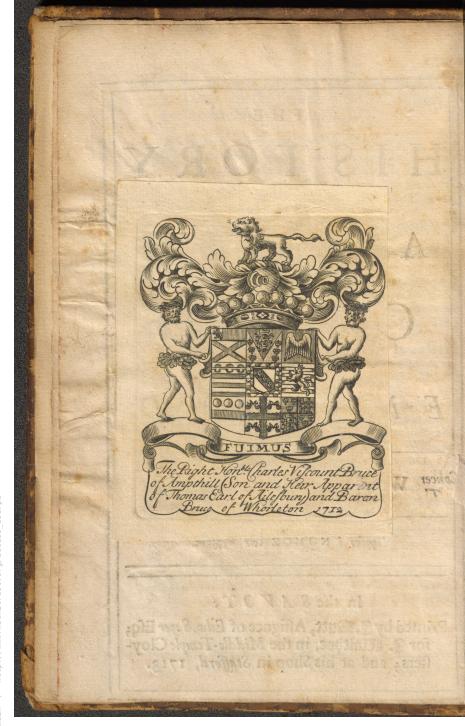
### ENGLAND:

Written by a Learned Hand.

Ίρυς ου ο ΝΘ'ΜΟΣ ές το άς χουτα.

In the SAVOY:

Printed by J. Butt, Assignee of Edw. Sayer Esq; for J. Walthoe, in the Middle-Temple Cloysters; and at his Shop in Stafford, 1713.



THE

THEODORTENT

## CONTENTS.

#### CHAP. I.

Oncerning the Distribution of the Laws of England into Common Law, and Statute Law.

And First, concerning the Statute Law, or Acts of Parliament. Page 1.

#### CHAP. II.

The Common or Municipal Laws of this Kingdom.

Page 23.

#### CHAP. III.

Concerning the Common Law of England, its Use and Excellence, and the Reason of its Denomination. Page 45.

A 3

CHAP.

#### The CONTENTS.

#### CHAP. IV.

Touching the Original of the Common Law of England. Page 58.

#### CHAP. V.

How the Common Law of England stood at and for some Time after the coming in of King William I. Page 71.

#### CHAP. VI.

Concerning the Parity or Similitude of the Laws of England and Normandy, and the Reasons thereof. Page 111.

#### CHAP. VII.

Concerning the Progress of the Laws of England after the Time of King William I. until the Time of King Edward II. Page 134.

#### CHAP. VIII.

A Brief Continuation of the Progress of the Laws, from the Time of King Edward



#### The CONTENTS.

ward II. inclusive, down to these Times. Page 167.

#### CHAP. IX.

Concerning the settling of the Common Law of England in Ireland and Wales:
And some Observations touching the Isles of Man, Jersey and Guernsey, &c.
Page 178.

#### CHAP. X.

of England unto the Kingdom of Scotland.

Concerning the Communication of the Laws of England unto the Kingdom of Page 190.

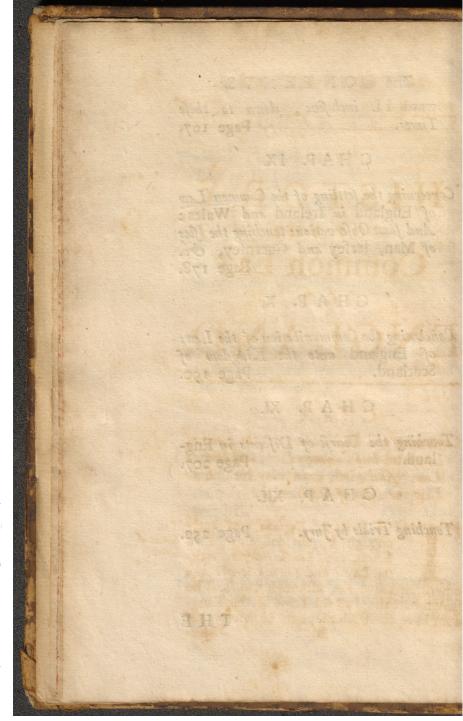
#### CHAP. XI.

Touching the Course of Descents in England. Page 207.

#### CHAP. XII.

Touching Trials by Jury. Page 252.

THE



# HISTORY

OFTHE

Common Law

OF

# ENGLAND.

CHAP. I.

Concerning the Distribution of the Laws of England into Common Law, and Statute Law. And First, concerning the Statute Law, or Acts of Parliament.

HE Laws of England may aptly The enough be divided into Two Kinds of Kinds, viz. Lew Scripta, the written Law; and Lew non Scripta, the unwritten Law: For although (as shall be shewn hereafter) all the Laws of this Kingdom have some Monuments of Memorials

marina Tenara

120 H

thereof in Writing, yet all of them have not their Original in Writing; for some of those Laws have obtain'd their Force by immemorial Usage or Custom, and such Laws are properly called Leges non Scriptæ, or un-

1. Leges wonScripta. written Laws or Customs.

2. Leges Stripta.

Those Laws therefore that I call Leges Scriptæ, or written Laws, are such as are usually called Statute Laws, or Acts of Parliament, which are originally reduced into Writing before they are enacted, or receive any binding Power, every fuch Law being in the first Instance formally drawn up in Writing, and made, as it were, a Tripartite Indenture, between the King, the Lords and the Commons; for without the concurrent Consent of all those Three Parts of the Legislature, no such Law is, or can be made: But the Kings of this Realm, with the Advice and Consent of both Houses of Parliament, have Power to make New Laws, or to alter, repeal, or enforce the Old. has been done in all Succession of Ages.

Statute Laws of Two Kinds.

Time of Memory. Now Statute Laws, or Acts of Parliament, are of Two Kinds, wiz. First, Those Statutes which were made before Time of Memory; and, Secondly, Those Statutes which were made within or fince Time of Memory; wherein observe, That according to a juridical Account and legal Signification, Time within Memory is the Time of Limitation in a Writ of Right; which by the Statute of Westminster 1. cap. 28. was settled, and reduced to the Beginning of the Reign of King Riebard I. of Ex prima Coronatione Regis Richards

Primi.

#### Ch. t. Common Law of England.

Primi, who began his Reign the 6th of Fuly 1189, and was crown'd the 3d of September following: So that whatfoever was before that Time, is before Time of Memory; and what is fince that Time, is, in a legal Senie, laid to be within or fince the

Time of Memory.

And therefore it is, that those Statutes or Acts of Parliament that were made before the beginning of the Reign of King Richard I. and have not fince been repealed or altered, either by contrary Usage, or by subsequent Acts of Parliament, are now accounted Part of the Lex non Scripta, being as it were incorporated thereinto, and become a Part of the Common Law; and in Truth, such Statutes are not now pleadable as Acts of Parliament, (because what is before Time of Memory is supposed without a Beginning, or at least such a Beginning as the Law takes Notice of ) but they obtain their Strength by meer immemorial Ufage or Custom.

And doubtless, many of those Things Ancient that now obtain as Common Law, had their Statutes. Original by Parliamentary Acts or Constitutions, made in Writing by the King, Lords and Commons; though those Acts are now either not extant, or if extant, were made before Time of Memory; and the Evidence of the Truth hereof will easily appear, for that in many of those old Acts of Parliament that were made before Time of Memory, and are yet extant, we may find many of those Laws enacted which Mon

now obtain meerly as Common Law, or the General Custom of the Realm: And were the rest of those Laws extant, probably the Footsteps of the Original Institution of many more Laws that now obtain meerly as Common Law, or Customary Laws, by immemorial Usage, would appear to have been at first Statute Laws, or Acts of Parliament.

Of Two Periods.

Those ancient Acts of Parliament which are ranged under the Head of Leges non Scriptæ, or Customary Laws, as being made before Time of Memory, are to be confidered under Two Periods: Viz. First, Such as were made before the coming in of King William I. commonly called, The Conqueror; or, Secondly, Such as intervened between his coming in, and the beginning of the Reign of Richard I. which is the legal Limitation of Time of Memory.

. Before K. W. I.

The former Sort of these Laws are mentioned by our ancient Historians, especially by Brompton, and are now collected into one Volume, by William Lambard Efg; in his Tractatus de priscis Anglorum Legibus, being a Collection of the Laws of the Kings. Ina, Alfred, Edward, Athelstane, Edmond, Edgar, Ethelred, Canutus, and of Edward the Confessor; which last Body of Laws, compiled by Edward the Confessor, as they were more full and perfect than the rest, and better accommodated to the then State of Things, fo they were fuch whereof the English were always very zealous, as being the great Rule and Standard of their Rights

#### Ch. r. Common Law of England.

Rights and Liberties: Whereof more hereafter.

The second Sort are those Edicts, Acts of 2. From Parliament, or Laws, that were made after W. 1. to the coming in of King William, commonly R. I. named, The Conqueror, and before the beginning of the Reign of King Richard I. and more especially are those which follow; whereof I shall make but a brief Remembrance here, because it will be necessary in the Sequel of this Discourse (it may be more than once) to resume the Mention of them; and besides, Mr. Selden, in his Book called, Fanus Anglorum, has given a full Account of those Laws; so that at present it will be sufficient for me, briefly to collect the Heads or Divisions of them, under the Reigns of those several Kings wherein they were made, viz.

First, The Laws of King William I. These K. W. 1. confifted in a great Measure of the Repetition of the Laws of King Edward the Confellor, and of the enforcing them by his own Authority, and the Affent of Parliament, at the Request of the English; and some new Laws were added by himself with the like Affent of Parliament, relating to Military Tenures, and the Preservation of the publick Peace of the Kingdom; all which are mention'd by Mr. Lambart, in the Trastate before-mentioned, but more fully by Mr. Selden, in his Collections and Observations upon Eadmerus.

Secondly, We find little of new Laws after K. H. I. this, till the Time of King Henry I. who B 3 b9-

K. H. 2.

besides the Confirmation of the Laws of the Confessor, and of King William I. brought in a new Volume of Laws, which to this Day are extant, and called the Laws of King Henry I. The entire Collection of these is entered in the Red Book of the Exchequer, and from thence are transcribed and published by the Care of Sir Roger Twisden, in the latter End of Mr. Lambart's Book before mention'd; what the Success of those Laws were in the Time of King Steven, and King Henry II. we shall see hereafter: But they did not much obtain in England, and are now for the most Part become wholly obsolete, and in Essect quite antiquated.

Thirdly, The next confiderable Body of Acts of Parliament, were those made under the Reign of King Henry II. commonly called, The Constitutions of Clarendon; what they were, appears best in Hoveden and Mat. Paris, under the Years of that King. We have little Memory else of any considerable Laws enacted in this King's Time, except his Assizes, and such Laws as related to the Forests; which were afterwards improved under the Reign of King Richard I. But

of this hereafter, more at large.

And this shall serve for a short Instance of those Statutes, or Acts of Parliament, that were made before Time of Memory; whereof, as we have no Authentical Records, but only Transcripts either in our ancient Historians, or other Books and Manuscripts; so they being Things done before Time of Memory, obtain at this Day an surther than as by Usage and Custom they

ares

#### Ch. 1. Common Law of England.

are, as it were, engrafted into the Body of the Common Law, and made a Part thereof.

And now I come to those Leges Scriptæ, Leges or Acts of Parliament, which were made Scripte: fince or within the Time of Memory, Kinds. viz. Since the beginning of the Reign of Richard I. and those I shall divide into Two General Heads, viz. Those we usually call the Old Statutes, and those we usually call the New or later Statutes: And because I would prefix some certain Term or Boundary between them, I shall call those the Old Statutes which end with the Reign of Old Sta-King Edward II. and those I shall call the tutes. New or later Statutes which begin with the Reign of King Edward III. and so are derived through a Succession of Kings and Queens down to this Day, by a continued and orderly Series.

Touching these later Sort I shall fay no- Later Stathing, for they all keep an orderly and re- tutes. gular Series of Time, and are extant upon Record, either in the Parliament Rolls, or in the Statute Rolls of King Edward III. and those Kings that follow: For excepting some few Years in the beginning of K. Edward III, i. e. 2, 3, 7, 8 & 9 Edw. 3. all the Parliament Rolls that ever were fince that Time have been preserved, and are extant; and, for the most Part, the Petitions upon which the Acts were drawn up, or

the very Acts themselves.

Now therefore touching the elder Acts Old Staof Parliament, viz. Those that were made tutes in between the First Year of the Reign of the Time K. Richard I. and the last Year of K. Edward II.

of K. R. 1.

B 4

We have little extant in any authentical History; and nothing in any authentical Record touching Acts made in the Time K. Rich. 1. of K. Rich. I. unless we take in those Constitutions and Assizes mentioned by Hoveden as aforesaid.

K. John.

Neither is there any great Evidence, what Acts of Parliament pass'd in the Time of King John, tho' doubtless many there were both in his Time, and in the Time of K. Rich. I. But there is no Record extant of them, and the English Histories of those Times give us but little Account of those Laws; only Matthew Para gives us an Historical Account of the Magna Charta, and Charta de Foresta, granted by King John at Running Mead the 15th of June, in the Seventeenth Year of his Reign.

His two Charters.

Granted in a Parlie amentary Way.

And it feems, that the Concession of these Charters was in a Parliamentary Way; you may see the Transcripts of both Charters werbatim in Mat. Paris, and in the Red Book of the Exchequer. There were seven Pair of these Charters sent to some of the Great Monasteries under the Seal of King John, one Part whereof sent to the Abby of Tewkesbury I have seen under the Seal of that King; the Substance thereof differs something from the Magna Charta, and Charta de Foresta, granted by King Hen. III. but not very much, as may appear by comparing them.

But tho' these Charters of King John seem to have been passed in a kind of Parliament, yet it was in a Time of great Consusion between that King and his Nobles; and there-

fore

#### Ch. 1. Common Law of England.

fore they obtained not a full Settlement till the Time of King Hen. III. when the Substance of them was enacted by a full and

folemn Parliament.

I therefore come down to the Times of those succeeding Kings, Hen. III. Edw. I. and Edw. II. and the Statutes made in the Times of those Kings, I call the Old Sta-Old Statutes; partly because many of them were tutes. made but in Affirmance of the Common Law; and partly because the rest of them. that made a Change in the Common Law, are yet so ancient, that they now seem to have been as it were a Part of the Common Law, especially considering the many Expositions that have been made of them in the feveral Successions of Times, whereby as they became the great Subject of Judicial Resolutions and Decisions; so those Expofitions and Decifions, together also with those old Statutes themselves, are as it were incorporated into the very Common Law. and become a Part of it.

In the Times of those three Kings last mentioned, as likewise in the Times of their Predecessors, there were doubtless many more Acts of Parliament made than are now extant of Record, or otherwise, which might be a Means of the Change of the Common Law in the Times of those Kings from what it was before, tho' all the Records or Memorials of those Acts of Parliament introducing fuch a Change, are not at this Day extant: But of those that are extant, I shall give you a brief Account,

not

not intending a large or accurate Treatife touching that Marter.

K. H. z. The Reign of Her

The Reign of Hen. III. was a troublesome Time, in respect of the Differences between him and his Barons, which were not composed till his sift Year, after the Battle of Evesham. In his Time there were many Parliaments, but we have only one Summons of Parliament extant of Record in his Reign, viz. 49 Hen. III. and we have but few of those many Acts of Parliament that passed in his Time, viz. The great Charter, and Charta de Foresta, in the Ninth Year of his Reign, which were doubtless pass'd in Parliament; the Statute of Merton, in the 20th Year of his Reign; the Statute of Marlbridge, in the 52d Year; and the Dictum sive Edictum de Kenelworth, about the same Time; and some few other old Acts.

K. E. T.

In the Time of K. Edw. I. there are many more Acts of Parliament extant than in the Time of K. Hen. III. Yet doubtless, in this King's Time, there were many more Statutes made than are now extant: Those that are now extant, are commonly bound together in the old Book of Magna Charta. By those Statutes, great Alterations and Amendments were made in the Common Law; and by those that are now extant, we may reasonably guess, that there were confiderable Alterations and Amendments made by those that are not extant, which possibly may be the real, tho' sudden Means of the great Advance and Alteration of the Laws of England in the King's Reign, over what

#### Ch. 1. Common Law of England.

what they were in the Time of his Predeceffors.

The first Summons of Parliament that I remember extant of Record in this King's Time, is 23 Edw. 1. tho' doubtless there were many more before this, the Records where of are either lost or missaid: For many Parliaments were held by this King before that Time, and many of the Acts pass'd in those Parliaments are still extant; as, the Statutes of Westminster 1. in the 3d of Edw. 1. The Statutes of Westminster 2. and of Winton, 13 Edw. 1. The Statutes of Westminster 2. and of Winton, 13 Edw. 1. The Statutes of Westminster 3. and of Quo Warranto, 18 Edw. 1. And divers others in other Years, which I shall have Occasion to mention hereaster.

In the Time of K. Edw. II. many Parlia- K. E. 2, ments were held, and many Laws were enacted; but we have few Acts of Parliament of his Reign extant, especially of Record. "The Statutes of this King's Reign which are in Print, are these, viz. The Statutes De Militibus, & de Frangentibus Prisonas, I Edw. 2. Articuli Cleri, 9 Edw. 2. De "Gaveletto in London, 10 Edw. 2. The Statutes of York, of Essoins and View of Land, 12 Edw. 2. Westminster 4. 13 Edw. 2. Of " Estreats, 15 Edw. 2. Prerogativa Regis, 17 Edw. 2. tho' some think this Statute to be made Temp. Edw. 1. The Statute of Homage, and the Statute De Terris " Templarior, also 17 Edw. 2. View of Frankpledge, 18 Edw. 2. And divers other

Digitized by UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN II

" Statutes in this King's Reign, but of un-

And now, because I intend to give some short Account of some general Observations touching Parliaments, and of Acts of Parliament pass'd in the Times of those three Princes, viz. Hen. III. Edw. I. and Edw. II. because they are of greatest Antiquity, and therefore the Circumstances that attended them most liable to be worn out by Process of Time, I will here mention some Particulars relating to them to preserve their Memory, and which may also be useful to be known in relation to other Things.

Parliamentary Records. We are therefore to know, That there are these several Kinds of Records of Things done in Parliament, or especially relating thereto, viz. 1. The Summons to Parliament. 2. The Rolls of Parliament. 3. Bundles of Petitions in Parliament. 4. The Statutes, or Acts of Parliament themselves. And, 5. The Brevia de Parliamento, which for the most Part were such as issued for the Wages of Knights and Burgesses; but with these I shall not meddle.

Summons to Parliament. First, As to the Summons to Parliament. These Summons to Parliament are not all entred of Record in the Times of Hen. III. and Edw. I. none being extant of Record in the Time of Hen. III. but that of 49 Hen. 3. and none in the Time of Edw. I. till the 23 Edw. 1. But after that Year, they are for the most part extant of Record, viz. In Dorso

בנוטע

#### Ch. r. Common Law of England.

Dorso Claus' Rotulorum, in the Backside of the Close Rolls.

Secondly, As to the Rolls of Parliament, Rolls of viz. The Entry of the several Petitions, Parlia-Answers and Transactions in Parliament. Those are generally and successively extant of Record in the Tower, from 4 Edw. 3. downward till the End of the Reign of Edw. IV. Excepting only those Parliaments that intervened between the ift and the 4th, and between the 6th and the 11th,

of Edw. III.

But of those Rolls in the Times of Hen. III. Many and Edw. I. and Edw. II. many are loft, and loft, &c. few extant; also, of the Time of Hen. III. I have not feen any Parliament Roll; and all that I ever saw of the Time of Edw. I. was one Roll of Parliament in the Receipt of the Exchequer of 18 Edw. 1. and those Proceedings and Remembrances which are in the Liber placitor' Parliamenti in the Tower. beginning as I remember with the 20th Year of Edw. I. and ending with the Parliament of Carlifle, 35 Edw. 1. And not continued between those Years with any constant Series; but including some Remembrances of some Parliaments in the Time of Edw. I. and others in the Time of Edw. II.

In the Time of Edw. II. besides the Rotulus Ordinationum, of the Lords Ordoners, about 7 Edw. 2. we have little more than the Parliament Rolls of 7 & 8 Edw. 2. and what others are interspersed in the Parliament Book of Edw I. above-mention'd, and, as I remember, some short Remembran-

12

ces

ces of Things done in Parliament in the 19 Edw. 3.

Bundles of Petitions.

Thirdly, As to the Bundles of Petitions in Parliament: They were for the most part Peririons of private Persons, and are commonly endorsed with Remissions to the several Courts where they were properly deter-There are many of those Bundles of Petitions, some in the Times of Edw. I. and Edw. II. and more in the Times of Edw. III. and the Kings that succeeded him.

Acts, or Statutes.

Fourtbly, The Statutes, or Acts of Parliament themselves. These seem, as if in the Time of Edw. I. they were drawn up into the Form of a Law in the first Instance, and fo affented to by both Houses, and the King, as may appear by the very Observation of the Contexture and Fabrick of the Statutes of those Times. But from near the of Passing beginning of the Reign of Edw. III. till anciently. very near the end of Hen. VI. they were not in the first Instance drawn up in the Form of Acts of Parliament; but the Petition and the Answer were entred in the Parliament Rolls, and out of both, by Advice of the Judges and others of the King's Council, the Act was drawn up conformable to the Perition and Answer, and the

And of later Times.

But because sometimes Difficulties and Troubles arose, by this extracting of the Statute

Act it felf for the most part entred in a Roll, called, The Statute Roll, and the Tenor thereof affixed to Proclamation Writs, directed to the several Sheriffs to proclaim it as a Law in their respective Counties.

https://hdl.handle.net/2027/uiuc.8395964 Generated on 2023-03-20 16:46 GMT / https://hdl.handle.i Public Domain / http://www.hathitrust.org/access use#pd

tute out of the Petition and Answer; about the latter end of Hen. VI. and beginning of Edw. IV. they took a Course to reduce em, even in the first Instance, into the full and compleat Form of Acts of Parliament, which was profecuted (or Entred) commonly in this Form : Item quædam Petitio exhibita fuit in hoc Parliamento formam actus in fe continens, &c. and abating that Stile, the Method still continues much the same, namely; That the entire Act is drawn up in Form, and so comes to the King for his Affent.

The ancient Method of passing Acts of Parliament being thus declared, I shall now give an Account touching those Acts of Par- Statutes hament that are at this Day extant of the extant. Times of Hen. III. Edw. I. and Edw. II. and they are of two Sorts, viz. Some of them Two are extant of Record; others are extant in Sorts. ancient Books and Memorials, but not of Record. And those which are extant of Re- 1. Of Record, are either Recorded in the proper and cord. natural Roll, viz. the Statute Roll; or they are entred in some other Roll, especially in the Close Rolls and Patent Rolls, or in both. Those that are extant, but not of Record, are such as tho' they have no Record extant of them, but possibly the same is lost; yet they are preserved in ancient Books and Monuments, and in all Times have had the Reputation and Authority of Acts of Parliament.

For an Act of Parliament made within Time of Memory, loses not its being fo, be-

http://www.hathitrust.org/access GMT on 2023-03-20 Generated C Public Doma Record.

because not extant of Record, especially if it be a general Act of Parliament. For of general Acts of Parliament, the Courts of Common Law are to take Notice without pleading of them; and fuch Acts shall 2. Not of never be put to be tried by the Record, upon an Issue of Nul tiel Record, but it shall be tried by the Court, who, if there be any Difficulty or Uncertainty touching it or the right Pleading of it, are to use for their Information ancient Copies, Transcripts, Books, Pleadings and Memorials to inform

themselves, but not to admit the same to be put in Issue by a Plea of Nul tiel Record. For, as shall be shewn hereafter, there are very many old Statutes which are admitted and obtain as fuch, tho' there be no Record at this Day extant thereof, nor yet any other written Evidence of the same, but what is in a manner only Traditional, as namely, Ancient and Modern Books of Pleadings, and the common received Opinion and Reputation, and the Approbation of the Judges Learned in the Laws: For the Judges and Courts of Justice are; ex Officios (bound) to take Notice of publick Acts of Parliament, and whether they are truly pleaded or not, and therefore they are the

Triers of them. But it is otherwise of private Acts of Parliament, for they may be put in Issue, and tried by the Record upon Nul tiel Record pleaded, unless they are produced Exemplified, as was done in the

Prince's Cafe in my Lord Gook's 8th Rep. and

therefora

#### Ch. r. Common Law of England.

therefore the Averment of Nul tiel Record was refused in that Case.

The old Statutes or Acts of Parliament that are of Record, as is before said, are entred either upon the proper Statute Roll, or some

other Roll in Chancery.

The first Statute Roll which we have, is The first in the Tower, and begins with Magna Charta, Statute and ends with Edw. III. and is called Mag- Roll. nus Rotulus Statutor'. There are five other Statute Rolls in that Office, of the Times of Rich. II. Hen. IV. Hen. V. Hen. VI. and Edw. IV.

I shall now give a Scheme of those Ancient ancient Statutes of the Times of Hen. III. Statutes Edw. I. and Edw. II. that are recorded in of Record the first of those Rolls or elsewhere, to the best of my Remembrance, and according to those Memorials I have long had by

me, viz.

Magna Charta. Magno Rot. Stat. membr. 40. & Rot. Cartar. 28 E. I. membr. 16.

Charta de Foresta. Mag. Rot. Stat. memb. 19.

& Rot. Cartar. 28 E. I. membr. 26.

Sat. de Gloucestre. Mag. Rot. Stat. memb. 47. Westm. 2. Rot. Mag. Stat. membr. 47.

Westm. 3. Rot. Clauso, 18 E. I. membr. 6. Dorlo.

Winton. Rot. Mag. Stat. membr. 41. Rot. Clauso, 8 E. 3. membr. 6. Dorso. Pars 2. Rot. Claufo, 5 R. 2. membr. 13. Rot. Paten. 25 E. I. membr. 12.

De Mercatoribus. Mag. Rot. Stat. membr. 47.

In Dorlo.

De

17

Original from UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

De Religiosis. Mag. Rot. Stat. membr. 47. Articuli Cleri. Mag. Rot. Stat. membr. 34. Dorso 2 Pars. Pat. E. I. 2. membr. 34. 2 Pars. Pat. 2 E. 3. membr. 15.

De hiis qui ponendi sunt in Assis. Mag. Rot.

Stat. membr. 41.

De Finibus levatis. Mag. Rot. Stat. memb. 37. De defensione Juris liberi Parliam. Lib. Parl. E. I. fo. 32.

Stat. Eborum. Mag. Rot. Stat. membr. 22. De conjunctis infeofatis. Mag. Rot. Stat.

membr. 34.

De Escaetoribus. Mag. Rot. Stat. membr. 35. Dorso, & Rot. Claus. 29 E. 1. membr. 14. Dorlo.

Stat. de Lincolne. Mag. Rot. Stat. memb. 32. Stat. de Priscis. Rot. Mag. Stat. membr. 33. In Schedula de libertatibus perquirendis, vel Rot. Clauf. 27 E. I. membr. 24.

Stat. de Acton Burnel. Rot. Mag. Stat. membr. 46. Dorso, & Rot. Claus. II E. I.

membr. 2.

Juramentum Vicecomit. Rot. Mag. Stat. membr. 34. Dorso, & Rot. Claus. 5 E. 2. membr. 23.

Articuli Stat. Gloucestriæ. Rot. Clauf. 2 E. 2.

Pars 2. membr. 8.

De Pistoribus & Braciatoribus. 2 Pars Claus. vel Pat. 2 R. 2. membr. 29.

De asportatis Religiosor. Mag. Rot. Stat.

membr. 33.

Westm. 4. De Vicecomitibus & Viridi cara. Rot. Mag. Stat. membr. 33. In Dorso.

Confirmationes Chartarum. Mag. Rot. Stat. membr. 28.

De

GMT

Generated on 2023-03-20 Public Domain / http:/

De Terris Templariorum. Mag. Rot. Stat. memb. 21. in Dorfo, & Clauf. 17 E. 2. membr. 4. Litera patens super prisis bonorum Cleri. Rot.

Mag. Stat. membr. 32. In Dorfo.

De Forma mittendi extractas ad Scaccar. Rot. Mag. Stat. membr. 36. & membr. 30. In Dorfo. Statutum de Scaccar. Mag. Rot. Stat. Statutum de Rutland. Rot. Clauf. 12 E. I.

Ordinatio Forestæ. Mag. Rot. Stat. memb. 30. & Rot. Clauf. 17 E. 2. Pars 2. membr. 3.

According to a ffrict Inquiry made about 30 Years fince, these were all the old Statutes of the Times of Hen. III. Edw. I. and Edw. II. that were then to be found of Record; what other Statutes have been found

fince, I know not.

The Ordinance called Butlers, for the Butler's Heir to punish Wast in the Life of the An-Ordiceftor, tho' it be of Record in the Parliament Book of Edw. I. yet it never was a Statute, nor never fo received, but only some Constitution of the King's Council or Lords in Parliament, and which never obtain'd the Strength or Force of an Act of Parliament.

Now those Statues that ensue, tho' most Ancient of 'em are unquestionable Acts of Parlia- Statutes ment, yet are not of Record that I know of, Record. but only their Memorials preserved in ancient Printed and Manuscript Books of Statutes; yet they are at this Day for the most part generally accepted and taken as Acts of Parliament tho' some of 'em are now antiquated, and of little Use, viz

The

The Statutes of Merton, Marlbridge, Westm. I. Explanatio Statuti Gloucestria, De Champertio, De visu Frankplegii, De pane & Cervisia, Articuli Inquisitionis super Stat. de Winton, Circumspecte agatis, De districtione Scaccarii, De Conspirationibus, De vocatis ad Warrant. Statut. de Carliol, De Prerogativa Regis, De modo faciendi Homag. De Wardis & Releivis Dies Communes in Banco. Stat. de Bigamis, Dies communes in Banco in casu consimili. Scat. Hiberniæ, De quo Warranto, De Essoin calumpniand. Judicium collistrigii, De Frangentibus Prisonar'. De malefactoribus in Parcis, De Consultationibus, De Officio Coronatoris, De Protectionibus, Sententia lata super Chartas, Modus levandi Fines. Statut. de Gavelet, De Militibus, De Vasto, De anno Bissextili, De appellatis, De Extenta Manerii, Compositio Mensearum vel Computatio Mensarum. Stat. de Quo Warranto, Ordinatio de Inquisitionibus, Ordinatio de Foresta, De admensura Terre, De dimissione Denarior. Statut. de Quo Warranto novum, Ne Rector prosternat arbores in Cameterio, Consuetudines & Assisa de Foresta, Compositio de Ponderibus, De Tallagio, De visu Terræ & servitio Regis, Compositio ulnarum & particarum, De Terris amortizandis, Dictum de Kenelworth, &c.

From whence we may collect these Two Observations, viz.

First, That altho' the Record it self be not extant, yet general Statutes made within Time of Memory, namely, since 1° Richardi Primi, do not lose their Strength, if any authentical

### Ch. r. Common Law of England.

thentical Memorials thereof are in Books, and feconded with a general received Tradition attesting and approving the same.

Secondly, That many Records, even of Many Acts of Parliament, have in long Process of Acts of Time been loft, and possibly the Things Parliathemselves forgotten at this Day, which yet in or near the Times wherein they were made, might cause many of those authoritative Alterations in some Things touching the Proceedings and Decisions in Law: The original Cause of which Change being otherwise at this Day hid and unknown to us; and indeed, Histories (and Annals) give us an Account of the Suffrages of many Parliaments, whereof we at this Time have none, or few Footsteps extant in Records or Acts of Parliament. The Instance of the great Parliament at Oxford, about 40th of Hen. III. may, among many others of like Nature, be a concurrent Evidence of this: For tho' we have Mention made in our Histories of many Constitutions made in the said Parliament at Oxford, and which occasioned much Trouble in the Kingdom, yet we have no Monuments of Record concerning that Parliament, or what those Constitutions were.

And thus much shall serve touching those Old Statutes or Leges Scriptæ, or Acts of Parliament made in the Times of those three Kings,

21

Kings, Hen. III. Edw. I. and Edw. II. Those that follow in the Times of Edw. III. and the fucceeding Kings, are drawn down in a continued Series of Time, and are extant of Record in the Parliament Rolls. and in the Statute Rolls, without any remarkable Omiffion, and therefore I shall fay nothing of them.

ung Ribin ( vin ) - infilit dan grading in

CHAP.

IN the former Chapter, I have given you The Com-a short Account of that Part of the mon Law Laws of England which is called Lex Scripta, confifts namely, Statutes or Acts of Parliament, which in their original Formation are reduced into Writing, and are so preserv'd in their Original Form, and in the same Stile and Words wherein they were first made: I now come to that Part of our Laws called, Lex non Scripta, under which I include not only General Customs, or the Common General Law properly fo called, but even those Customs, more particular Laws and Customs applica- And parble to certain Courts and Persons, whereof ticular. more hereafter

And when I call those Parts of our Laws Leges non Scriptæ, I do not mean as if all Written those Laws were only Oral, or communi- in Books, cated from the former Ages to the later, merely by Word. For all those Laws have their feveral Monuments in Writing, whereby they are transferr'd from one Age to another, and without which they would foon lose all kind of Certainty: For as the Civil and Canon Laws have their Responsa Prudentum

GMT Generated on 2023-03-20 16:46 Public Domain / http://www.h

dentum, Consilia & Decisiones, i. e. their Canons, Decrees, and Decretal Determinations extant in Writing; fo those Laws of England which are not comprized under the Title of Acts of Parliament, are for the most part extant in Records of Pleas, Proceedings and Judgments, in Books of Reports, and Judicial Decisions, in Tractates of Learned Men's Arguments and Opinions, preferv'd from ancient Times, and still extant in Writing.

Hath its Force by Ulage.

But I therefore stile those Parts of the Law, Leges non Scriptæ, because their Authoritative and Original Institutions are not set down in Writing in that Manner, or with that Authority that Acts of Parliament are; but they are grown into Use, and have acquired their binding Power and the Force of Laws by a long and immemorial Usage, and by the Strength of Custom and Reception in this Kingdom. The Matters indeed, and the Substance of those Laws, are in Writing, but the formal and obliging Force and Power of them grows by long Custom and Use, as will fully appear in the ensuing Discourse.

Now the Municipal Laws of this Kingdom, which I thus call Leges non Scriptæ, are of a vast Extent, and indeed include in their Generalty all those several Laws which are allowed, as the Rule and Direction of Juflice and Judicial Proceedings, and which are applicable to all those various Subjects, about which Justice is conversant. I shall, for more Order, and the better to guide

my

# Ch. 2. Common Law of England.

my Reader, distinguish them into Two Is of Two Kinds, viz.

First, The Common Law, as it is taken in its proper and usual Acceptation.

Secondly, Those particular Laws applicable to particular Subjects, Matters or Courts.

1. Touching the former, viz. The Com- 1. Common Law in its usual and proper Accepta- mon Law. tion. This is that Law by which Proceed- Its Exings and Determinations in the King's Ordinary Courts of Justice are directed and guided. This directs the Course of Discents of Lands, and the Kinds; the Natures, and the Extents and Qualifications of Estates: therein also the Manner, Forms, Ceremonies and Solemnities of transferring Estates from one to another: The Rules of Settling, Acquiring, and Transferring of Properties; The Forms, Solemnities and Obligation of Contracts; The Rules and Directions for the Exposition of Wills, Deeds and Acts of Parliament. The Process, Proceedings, Judgments and Executions of the King's Ordinary Courts of Justice; The Limits, Bounds and Extents of Courts, and their Jurisdictions. The several Kinds of Temporal Offences, and Punishments at Common Law; and the Manner of the Application of the feveral Kinds of Punishments, and infinite more Particulars which extend themlelves as large as the many Exigencies in the Distri-

And besides these more common and ordinary Matters to which the Common Law extends, it likewise includes the Laws applicable to divers Matters of very great Moment; and tho' by reason of that Application, the faid Common Law affumes divers Denominations, yet they are but Its Deno- Branches and Parts of it; like as the same Ocean, tho' it many times receives a different Name from the Province, Shire, Island or Country to which it is contiguous, yet

these are but Parts of the same Ocean.

minations.

> Thus the Common Law includes, Lex Prerogativa, as 'tis applied with certain Rules to that great Business of the King's Prerogative; fo 'tis called Lex Foresta, as it is applied under its special and proper Rules to the Business of Forests; so it is called Lex Mercatoria, as it is applied under its proper Rules to the Business of Trade and Comerce: and many more Instances of like Nature may be given: Nay, the various and particular Customs of Ciries, Towns and Manors, are thus far Parts of the Common Law as they are applicable to those particular Places, which will appear from these Observations, viz.

Its Effects on particular Customs.

First, The Common Law does determine what of those Customs are good and reafonable, and what are unreasonable and void. Secondly, The Common Law gives to those Customs that it adjudges reasonable, the Force and Efficacy of their Obli-

gation.

Thirdly, The Common Law determines what is that Continuance of Time that is sufficient to make such a Custom. Fourtbly, The Common Law does interpofe and authoritatively decide the Exposition, Limits and Extension of such Customs.

This Common Law, though the Usage, Notalter-Practice and Decisions of the King's Courts able but by Staof Justice may expound and evidence it, tute. and be of great Use to illustrate and explain it; yet it cannot be authoritatively altered or changed but by Act of Parliament. But of this Common Law, and the Reason of its Denomination, more at large hereafter.

Now, Secondly, As to those particular Laws 2dly, Par-I before mentioned, which are applicable ticular to particular Matters, Subjects or Courts: Laws, viz. These make up the second Branch of the Laws of England, which I include under the general Term of Leges non Scriptæ, and by those particular Laws, I mean the Laws Ecclesiastical, and the Civil Law, so far forth as they are admitted in certain Courts, and certain Matters allow'd to the Decision of those Courts, whereof hereafter.

It is true, That those Civil and Ecclesiasti- r. Civil. cal Laws are indeed Written Laws; The 2. Eccle-Civil Law being contain'd in their Pandects, fiastical. and the Institutions of Justinian, &c. (their Imperial Constitutions or Codes answering to our Leges Scriptæ, or Statutes.) And the Canon or Ecclefiastical Laws contained for the most part in the Canons and Constitutions of Councils and Popes, collected in

http://www.hathitrust.org/access use#pd GMT 16:46 Generated on 2023-03-20 Public Domain / http:/ 18

De Religiosis. Mag. Rot. Stat. membr. 47. Articuli Cleri. Mag. Rot. Stat. membr. 34. Dorso 2 Pars. Pat. E. 1. 2. membr. 34. 2 Pars. Pat. 2 E. 3. membr. 15.

De hiis qui ponendi sunt in Assis. Mag. Rot.

Stat. membr. 41.

De Finibus levatis. Mag. Rot. Stat. memb. 37. De defensione Juris liberi Parliam. Lib. Parl. E. I. fo. 32.

Stat. Eborum. Mag. Rot. Stat. membr. 32. De conjunctis infeofatis. Mag. Rot. Stat.

membr. 34.

De Escaetoribus. Mag. Rot. Stat. membr. 35. Dorso, & Rot. Clauf. 29 E. 1. membr. 14. Dorlo.

Stat. de Lincolne. Mag. Rot. Stat. memb. 22. Stat. de Priscis. Rot. Mag. Stat. membr. 33. In Schedula de libertatibus perquirendis, vel Rot. Clauf. 27 E. I. membr. 24.

Stat. de Acton Burnel. Rot. Mag. Stat. membr. 46. Dorso, & Rot. Claus. II E. I.

membr. 2.

Furamentum Vicecomit. Rot. Mag. Stat. membr. 34. Dorso, & Rot. Clauf. 5 E. 2. membr. 23.

Articuli Stat. Gloucestriæ. Rot. Claus. 2 E. 2.

Pars 2. membr. 8.

De Pistoribus & Braciatoribus. 2 Pars Claus. vel Pat. 2 R. 2. membr. 29.

De asportatis Religiosor. Mag. Rot. Stat.

membr. 33.

Westm. 4. De Vicecomitibus & Viridi cæra.

Rot. Mag. Stat. membr. 32. In Dorso.

Confirmationes Chartarum. Mag. Rot. Stat. membr. 28.

De

memb. 31. in Dorfo, & Clauf. 17 E. 2. membr. 4. Litera patens super prisis bonorum Cleri. Rot. Mag. Stat. membr. 33. In Dorso. De Forma mittendi extractas ad Scaccar. Rot. Mag. Stat. membr. 36. & membr. 30. In Dorso. Statutum de Scaccar. Mag. Rot. Stat. Statutum de Rutland. Rot. Claus. 12 E. I.

Ordinatio Forestæ. Mag. Rot. Stat. memb. 30. & Rot. Clauf. 17 E. 2. Pars 2. membr. 3.

According to a strict Inquiry made about 30 Years fince, these were all the old Statutes of the Times of Hen. III. Edw. I. and Edw. II. that were then to be found of Record; what other Statutes have been found fince, I know not.

The Ordinance called Butlers, for the Butler's Heir to punish Wast in the Life of the An-Ordicestor, tho' it be of Record in the Parliament Book of Edw. I. yet it never was a Statute, nor never to received, but only Iome Constitution of the King's Council or Lords in Parliament, and which never obtain'd the Strength or Force of an Act of Parliament.

Now those Statues that ensue, tho' most Ancient of 'em are unquestionable Acts of Parlia-not of ment, yet are not of Record that I know of, Record. but only their Memorials preserved in ancient Printed and Manuscript Books of Statutes; yet they are at this Day for the most part generally accepted and taken as Acts of Parliament tho' fome of 'em are now antiquated, and of little Use, viz.

The

http://www.hathitrust.org/access use#pd 16:46 Generated on 2023-03-20 Public Domain / http:/

The Statutes of Merton, Marlbridge, Westm. 1. Explanatio Statuti Gloucestria, De Champertio, De visu Frankplegii, De pane O Cervisia, Articuli Inquisitionis super Stat. de Winton, Circumspecte agatis, De districtione Scaccarii, De Conspirationibus, De vocatis ad Warrant. Statut. de Carliol, De Prerogativa Regis, De modo faciendi Homag. De Wardis & Releivis Dies Communes in Banco. Stat. de Bigamis, Dies communes in Banco in casu consimili. Stat. Hiberniæ, De quo Warranto, De Essoin calumpniand. Judicium collistrigii, De Frangentibus Prisonar'. De malefactoribus in Parcis, De Consultationibus, De Officio Coronatoris, De Protectionibus, Sententia lata super Chartas, Modus levandi Fines. Statut. de Gavelet, De Militibus, De Vasto, De anno Bissextili, De appellatis, De Extenta Manerii, Compositio Mensearum vel Computatio Mensarum. Stat. de Quo Warranto, Ordinatio de Inquisitionibus, Ordinatio de Foresta, De admensura Terre, De dimissione Denarior. Statut. de Quo Warranto novum, Ne Rector prosternat arbores in Cameterio, Consuetudines & Assisa de Foresta, Compositio de Ponderibus, De Tallagio, De visu Terræ & servitio Regis, Compositio ulnarum & particarum, De Terris amortizandis, Dictum de Kenelworth, &c.

From whence we may collect these Two Observations, viz.

First, That altho' the Record it self be not extant, yet general Statutes made within Time of Memory, namely, since 1° Richardi Primi, do not lose their Strength, if any authentical

thentical Memorials thereof are in Books, and feconded with a general received Tradition attesting and approving the lame.

Secondly, That many Records, even of Many Acts of Parliament, have in long Process of Acts of Time been loft, and possibly the Things Parliathemselves forgotten at this Day, which yet in or near the Times wherein they were made, might cause many of those authoritative Alterations in some Things touching the Proceedings and Decisions in Law: The original Cause of which Change being otherwise at this Day hid and unknown to us; and indeed, Histories (and Annals) give us an Account of the Suffrages of many Parliaments, whereof we at this Time have none, or few Footsteps extant in Records or Acts of Parliament. The Instance of the great Parliament at Oxford, about 40th of Hen. III. may, among many others of like Nature, be a concurrent Evidence of this: For tho' we have Mention made in our Histories of many Constitutions made in the said Parliament at Oxford, and which occasioned much Trouble in the Kingdom, yet we have no Monuments of Record concerning that Parliament, or what those Constitutions were.

And thus much shall serve touching those Old Statutes or Leges Scriptæ, or Acts of Parliament made in the Times of those three Kings,

Kings, Hen. III. Edw. I. and Edw. II. Those that follow in the Times of Edw. III. and the succeeding Kings, are drawn down in a continued Series of Time, and are extant of Record in the Parliament Rolls, and in the Statute Rolls, without any remarkable Omiffion, and therefore I shall fay nothing of them.

CHAP.

to estrate, true risban constatt gran

#### CHAP. II.

Concerning the Lex non Scripta, i. e. The Common or Municipal Laws of this Kingdom.

IN the former Chapter, I have given you The Com-a short Account of that Part of the mon Law Laws of England which is called Lex Scripta, confifts namely, Statutes or Acts of Parliament, which in their original Formation are reduced into Writing, and are fo preferv'd in their Original Form, and in the same Stile and Words wherein they were first made: I now come to that Part of our Laws called, Lex non Scripta, under which I include not only General Customs, or the Common General Law properly fo called, but even those Customs, more particular Laws and Customs applica- And parble to certain Courts and Persons, whereof ticular. more hereafter.

And when I call those Parts of our Laws Leges non Scriptæ, I do not mean as if all Written those Laws were only Oral, or communi- in Books, cated from the former Ages to the later, merely by Word. For all those Laws have their feveral Monuments in Writing, whereby they are transferr'd from one Age to another, and without which they would foon lose all kind of Certainty: For as the Civil and Canon Laws have their Responsa Prudentum

Generated on 2023-03-20 16:46 Public Domain / http://www.h

http://www.hathitrust.org/access use#pd Generated on 2023-03-20 Public Domain / http:/

dentum, Confilia & Decifiones, i. e. their Canons, Decrees, and Decretal Determinations extant in Writing; fo those Laws of England which are not comprized under the Title of Acts of Parliament, are for the most part extant in Records of Pleas, Proceedings and Judgments, in Books of Reports, and Judicial Decisions, in Tractates of Learned Men's Arguments and Opinions, preferv'd from ancient Times, and still extant in Writing:

Hath its Force by Ulage.

But I therefore stile those Parts of the Law, Leges non Scriptæ, because their Authoritative and Original Institutions are not set down in Writing in that Manner, or with that Authority that Acts of Parliament are: but they are grown into Use, and have acquired their binding Power and the Force of Laws by a long and immemorial Usage, and by the Strength of Custom and Reception in this Kingdom. The Matters indeed. and the Substance of those Laws, are in Writing, but the formal and obliging Force and Power of them grows by long Custom and Use, as will fully appear in the ensuing Discourse.

Now the Municipal Laws of this Kingdom, which I thus call Leges non Scriptæ, are of a vast Extent, and indeed include in their Generalty all those several Laws which are allowed, as the Rule and Direction of Juflice and Judicial Proceedings, and which are applicable to all those various Subjects, about which Justice is conversant. I shall, for more Order, and the better to guide

Ch. 2. Common Law of England.

my Reader, distinguish them into Two Is of Two Kinds, viz.

First, The Common Law, as it is taken in its proper and usual Acceptation.

Secondly, Those particular Laws applicable to particular Subjects, Matters or Courts.

1. Touching the former, viz. The Com- 1. Common Law in its usual and proper Accepta- mon Law. tion. This is that Law by which Proceed- Its Exings and Determinations in the King's Ordinary Courts of Justice are directed and guided. This directs the Course of Discents of Lands, and the Kinds; the Natures, and the Extents and Qualifications of Estates; therein also the Manner, Forms, Ceremonies and Solemnities of transferring Estates from one to another: The Rules of Settling, Acquiring, and Transferring of Properties; The Forms, Solemnities and Obligation of Contracts; The Rules and Directions for the Exposition of Wills, Deeds and Acts of Parliament. The Process, Proceedings, Judgments and Executions of the King's Ordinary Courts of Justice; The Limits, Bounds and Extents of Courts, and their Jurisdictions. The several Kinds of Temporal Offences, and Punishments at Common Law; and the Manner of the Application of the several Kinds of Punishments, and infinite more Particulars which extend themselves as large as the many Exigencies in the Distri-

Distribution of the King's Ordinary Justice

requires.

And besides these more common and ordinary Matters to which the Common Law extends, it likewise includes the Laws applicable to divers Matters of very great Moment; and tho' by reason of that Application, the faid Common Law affumes divers Denominations, yet they are but Its Deno- Branches and Parts of it; like as the fame Ocean, tho' it many times receives a different Name from the Province, Shire, Island or Country to which it is contiguous, yet these are but Parts of the same Ocean.

minations.

> Thus the Common Law includes, Lex Prerogativa, as 'tis applied with certain Rules to that great Business of the King's Prerogative; fo 'tis called Lex Foresta, as it is applied under its special and proper Rules to the Business of Forests; so it is called Lex Mercatoria, as it is applied under its proper Rules to the Business of Trade and Comerce; and many more Instances of like Nature may be given: Nay, the various and particular Customs of Ciries, Towns and Manors, are thus far Parts of the Common Law as they are applicable to those particular Places, which will appear from these Observations, viz.

Its Effects on particular Customs.

First, The Common Law does determine what of those Customs are good and reafonable, and what are unreasonable and void. Secondly, The Common Law gives to those Customs that it adjudges reasonable, the Force and Efficacy of their Obli-

gation.

gation. Thirdly, The Common Law determines what is that Continuance of Time that is sufficient to make such a Custom. Fourtbly, The Common Law does interpofe and authoritatively decide the Exposition, Limits and Extension of such Customs.

This Common Law, though the Usage, Notalter-Practice and Decisions of the King's Courts able but of Juffice may expound and evidence is by Staof Justice may expound and evidence it, tute. and be of great Use to illustrate and explain it; yet it cannot be authoritatively altered or changed but by Act of Parliament. But of this Common Law, and the Reason of its Denomination, more at large hereafter.

Now, Secondly, As to those particular Laws 2dly, Par-I before mentioned, which are applicable ticular to particular Matters, Subjects or Courts: Laws, viz. These make up the second Branch of the Laws of England, which I include under the general Term of Leges non Scriptæ, and by those particular Laws, I mean the Laws Ecclefiastical, and the Civil Law, so far forth as they are admitted in certain Courts, and certain Matters allow'd to the Decision

of those Courts, whereof hereafter. It is true, That those Civil and Ecclesiasti- r. Civil. cal Laws are indeed Written Laws; The 2. Eccle-Civil Law being contain'd in their Pandects, fiastical. and the Institutions of Justinian, &c. (their Imperial Constitutions or Codes answering to our Leges Scriptæ, or Statutes.) And the Canon or Ecclefiastical Laws contained for the most part in the Canons and Constitutions of Councils and Popes, collected in their

http://www.hathitrust.org/access\_use#pd GMT Generated on 2023-03-20 Public Domain / http:/ their Decretum Gratiani, and the Drecretal Epistles of Popes, which make up the Body of their Corpus Juris Canonici, together with huge Volumes of Councils, and Expositions, Decisions, and Tractates of learned Civilians and Canonitts, relating to both Laws; so that it may seem at first View very improper to rank these under the Branch of Leges non Scriptæ, or Unwritten Laws.

Why accounted Leges non Scripta.

But I have for the following Reason rang'd these Laws among the Unwritten Laws of England, viz. because it is most plain, That neither the Canon Law nor the Civil Law have any Obligation as Laws within this Kingdom, upon any Account that the Popes or Emperors made those Laws, Canons, Rescripts or Determinations, or because Fustinian compiled their Corpus Juris Civilis, and by his Edicts confirm'd and publish'd the same as authentical, or because this or that Council or Pope made those or these Canons or Decrees, or because Gratian, or Gregory, or Boniface, or Clement, did as much as in them lie authenticate this or that Body of Canons or Constitutions; for the King of England does not recognize any Foreign Authority, as superior or equal to him in this Kingdom, neither do any Laws of the Pope or Emperor, as they are fuch, bind here: But all the Strength that either the Papal or Imperial Laws have obtained in this Kingdom, is only because they have been received and admitted either by the Consent of Parliament, and so are part of the Statute Laws of the Kingdom, or elfe by

## Common Law of England.

by immemorial Usage and Custom in some particular Cases and Courts, and no otherwife, and therefore fo far as fuch Laws are received and allowed here, fo far they obtain and no further; and the Authority and Force they have here is not founded on, or derived from themselves; for so they bind no more with us than our Laws bind in Rome or Italy. But their Authority is founded merely on their being admitted and recei- by Ufige ved by us, which alone gives 'em their Au only. thoritative Essence, and qualifies their Obli-

gation.

And hence it is. That even in those Courts where the Use of those Laws is in- And condulged according to that Reception which troul'd by has been allowed 'em : If they exceed the monLaw Bounds of that Reception, by extending themselves to other Matters than has been allowed 'em; or if those Courts proceed according to that Law, when it is controuled by the Common Law of the Kingdom: The Common Law does and may prohibit and punish them; and it will not be a sufficient Answer, for them to tell the King's Courts, that Justinian or Pope Gregory have. decreed otherwise. For we are not bound by their Decrees further, or otherwise than as the Kingdom here has, as it were, transposed the same into the Common and Municipal Laws of the Realm, either by Admission of, or by Enacting the same, which is that alone which can make 'em of any Force in England. I need not give Particular Instances herein; the Truth thereof is plain

29

plain and evident, and we need go no further than the Statutes of 24 H. 8. cap. 12. 25 H. 8. c. 19, 20, 21. and the learned Notes of Selden upon Fleta, and the Records there cited; nor shall I spend much Time touching the Use of those Laws in the several Courts of this Kingdom: But will only briefly mention some few Things concerning them.

3 Courts using the Civil and Comon Law.

There are Three Courts of Note, wherein the Civil, and in one of them the Canon or Ecclesiastical Law, has been with certain Restrictions allowed in this Kingdom, viz. rft. The Courts Ecclesiastical, of the Bishops and their derivative Officers. 2dly. The Admiralty Court. 3 dly. The Curia Militaris, or Court of the Constable and Marshal, or Persons commissioned to exercise that Jurisdiction. I shall touch a little upon each of thefe.

r. Ecclefiastical Courts. e Kinds.

First, The Ecclesiastical Courts, they are of two Kinds, viz. 1st. Such as are derived immediately by the King's Commission; fuch was formerly the Court of High Commission; which tho', without the help of an Act of Parliament, it could not in Matters of Ecclefiaftical Cognizance use any Temporal Punishment or Censure, as Fine, Imprisonment, &c. Yet even by the Common Law, the Kings of England, being delivered from Papal Usurpation, might grant a Commission to hear and determine Ecclesiastical Causes and Offences, according to the King's Ecclesiastical Laws, as Cawdry's Case, Cook's 5th Report. 2dly. Such as are not

## Ch. 2. Common Law of England.

not derived by any immediate Commission from the King; but the Laws of England have annexed to certain Offices, Ecclefiastical Jurisdiction, as incident to such Offices: Thus every Bishop by his Election and Confirmation, even before Consecration, had Ecclesiastical Jurisdiction annex'd to his Office, as Judex Ordinarius within his Diocese; and divers Abbots anciently, and most Archdeacons at this Day, by Ulage, have had the like Jurisdiction within certain Limits and Precincts.

But altho' these are Judices Ordinarii, and Their Juhave Ecclesiastical Jurisdiction annex'd to risdiction their Ecclesiastical Offices, yet this Juris- derived diction Ecclesiastical in Foro Exteriori is de- Crown rived from the Crown of England: For there is no External Jurisdiction, whether Ecclesiastical or Civil, within this Realm, but what is derived from the Crown: It is true, both anciently, and at this Day, the Process of Ecclesiastical Courts runs in the Name, and Issues under the Seal of the Bishop; and that Practice stands so at this Day, by Vertue of several Acts of Parliament, too long here to recount. But that is no Impediment of their deriving their Jurisdiction from the Crown; for till 27 H. 8. cap. 24. the Process in Counties Palatine ran in the Name of the Counts Palatine, yet no Man ever doubted, but that the Palatine Jurisdictions were deriv'd from the Crown.

Touching the Severance of the Bishops Confistory from the Sheriff's Court : See the

TT.

31

owTio

Qr.

UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

the Charter of King Will. I. and Mr. Selden's Notes on Eadmerus.

Ecclesia-Stical Jurisdiction of Two

Kinds.

Eft. Cri-

minal.

Now the Matters of Ecclesiastical Jurisdiction are of Two Kinds, Criminal and Civil.

The Criminal Proceedings extend to fuch Crimes, as by the Laws of this Kingdom are of Ecclefiaftical Cognizance; as Herefie, Fornication, Adultery, and some others, wherein their Proceedings are, Pro Reformatione Morum & pro Salute Animæ; and the Reason why they have Conuzance of those and the like Offences, and not of others, as Murther, Theft, Burglary, &c. is not so much from the Nature of the Offence (for furely the one is as much a Sin as the other, and therefore if their Cognizance were of Offences quatenus peccata contra Deum, it should extend to all Sins whatfoever, it being against God's Law). But the true Reason is, because the Law of the Land has indulged unto that Jurisdiction the Conuzance of some Crimes, and not of others.

The Civil Causes committed to their Cog-2d. Civil. nizance, wherein the Proceedings are ad Instantiam Partis, ordinarily are Matters of Tythes, Rights of Institution and Induction to Ecclefiastical Benefices, Cases of Matrimony and Divorces, and Testamentary Causes, and the Incidents thereunto, as Infinuation or Probation of Testaments, Controversies touching the same, and of Lega-

cies of Goods and Monies, &c.

Altho' de Jure Communi the Cognizance of Wills and Testaments does not belong

to

#### Ch. 2. Common Law of England.

to the Ecclesiastical Court, but to the Temporal or Civil Jurisdiction; yet de Consuetudine Angliæ pertinet ad Judices Ecclesiasticos, as Linwood himself agrees, Exercit. de Testamentis, cap. 4. in Glossa. So that it is the Cufrom or Law of England that gives the Extent and Limits of their external Jurisdi-

ction in Foro Contentiofo.

The Rule by which they proceed, is the They Use Canon Law, but not in its full Latitude, and only fo far as it stands uncorrected, either by contrary Acts of Parliament, or the Common Law and Custom of England; for there are divers Canons made in ancient Times, and Decretals of the Popes that never were admitted here in England, and particularly in relation to Tythes; many Things being by our Laws Priviledg'd from Tythes, which by the Canon Law are chargable, (as Timber, Oar, Coals, &c.) without a Special Custom subjecting them thereunto.

Where the Canon Law, or the Stylus Curia, AndCivil. is filent, the Civil Law is taken in as a Director, especially in Points of Exposition and Determination, touching Wills and

Legacies.

But Things that are of Temporal Cogni- Not to zance only, cannot by Charter be deliver- judge of ed over to Ecclesiastical Jurisdiction, nor be judged according to the Rules of the Canon or Civil Law, which is aliud Examen, and not competent to the Nature of Things of Common Law Cognizance: And therefore, Mic. 8 H. 4. Rot. 72. coram Rege, when the

the Canon

33

Temporal

Chan-

Digitized by UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

Original from UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

Priviledge of the Univerfity.

Sentence

enforced.

ierogme?

Chancellor of Oxford proceeded according to the Rule of the Civil Law in a Case of Debt, the Judgment was reverfed in B. R. wherein the Principal Error affigned was, because they proceeded per Legem Civilem ubi quilibet ligeus Domini Regis Regni sui Anglice in quibuscunque placitis & querelis infra boc Regnum factis & emergentibus de Jure tractari debet per Communem Legem Anglia; and altho' King H. 8. 14 Anno Regni sui, granted to the University a liberal Charter to proceed according to the Use of the University, viz. By a Course much conform'd to the Civil Law; yet that Charter had not been fufficient to have warranted fuch Proceedings without the Help of an Act of Parliament: And therefore in 13 Eliz. an Act passed, whereby that Charter was in effect enacted; and tis thereby that at this Day they have a kind of Civil Law Proceedure, even in Matters that are of themselves of Common Law Cognizance, where either of the Parties to the Suit are priviledg'd.

The Coertion or Execution of the Sentence in Ecclefiastical Courts, is only by Excommunication of the Person contumatious, and upon Signification thereof into Chancery, a Writ de Excommunicato capiendo issues, whereby the Party is imprisoned till Obedience yielded to the Sentence. But besides this Coertion, the Sentences of the Ecclesiastical Courts touching some Matters do introduce a real Effect, without ony other Execution; as a Divorce, a Vinculo Matrimonii for the Caufes of Confanguinity,

http://www.hathitrust.org/access use#pd EMP GMT Generated on 2023-03-20 16:46 Public Domain / http://www.h

And thus much concerning the Ecclefiastical Courts, and the Use of the Canon and Civil Law in them, as they are the Rule and Direction of Proceedings therein.

Secondly, The Second Special Jurisdiction 2dly. The wherein the Civil Law is allow'd, at least Admiral as a Director or Rule in some Cases, is the Jurisdicti-Admiral Court or Jurisdiction. This Juris- on. diction is derived also from the Crown of England, either immediately by Commission from the King, or mediately, which is feveral Ways, either by Commission from the Lord High Admiral, whose Power and Constitution is by the King, or by the Charters granted to particular Corporations bordering upon the Sea, and by Commiffion from them, or by Prescription, which nevertheless in Presumption of Law is derived at first from the Crown by Charter not now extant.

The Admiral Jurisdiction is of Two Kinds, viz. Furisdictio Voluntaria, which is no other but the Power of the Lord High Admiral, as the King's General at Sea over his Fleets: or furifdictio Contentiofa, which is that Power of Jurisdiction which the Judge of the Admiralty has in Foro Contentiofo; and what I have to fay is of this later Jurisdiction.

2

The

http://www.hathitrust.org/access\_use#pd GMT Generated on 2023-03-20 16:46 Public Domain / http://www.h

The Jurisdiction of the Admiral Court, as to the Matter of it, is confined by the Laws of this Realm to Things done upon the High Sea only; as Depredations and Piracies upon the High Sea; Offences of Masters and Mariners upon the High Sea; Maritime Contracts made and to be executed upon the High Sea; Matters of Prize and Reprizal upon the High Sea. touching Contracts or Things made within the Bodies of English Counties, or upon the Land beyond the Sea, tho' the Execution thereof be in some Measure upon the High Sea, as Charter Parties, or Contracts made even upon the High Sea, touching Things that are not in their own Nature Maritime, as a Bond or Contract for the Payment of Money; fo also of Damages in Navigable Rivers, within the Bodies of Counties, Things done upon the Shore at Low-Water, Wreck of the Sea, &c. These Things belong not to the Admiral's Jurisdiction: And thus the Common Law, and the Statutes of 12 Rich. 2. cap. 15. 15 Rich. 2. cap. 3. confine and limit their Jurisdiction to Matters Maritime, and fuch only as are done upon the High Sea. This Court is not bottom'd or founded

The Ground of its Authority.

upon the Authority of the Civil Law, but has both its Power and Jurisdiction by the Law and Custom of the Realm, in such Matters as are proper for its Cognizance; and this appears by their Process, viz. The Arrest of the Persons of the Defendants as well as by Attachment of their Goods; and

likewise by those Customs and Laws Maritime, whereby many of their Proceedings are directed, and which are not in many Things conformable to the Rules of the Civil Law; fuch are those ancient Laws of Oleron, and other Customs introduced by the Practice of the Sea, and Stile of the Court.

Also, The Civil Law is allowed to be the Rule of their Proceedings, only fo far as the same is not contradicted by the Statute of this Kingdom, or by those Maritime Laws and Customs, which in some Points have obtain'd in Derogation of the Civil Law: But by the Statute 28 Hen. 8. cap. 15. all Treasons, Murders, Felonies, done on the High Sea, or in any Haven, River, Creck, Port or Place, where the Admirals have, or pretend to have Jurisdiction, are to be determined by the King's Commission, as if the Offences were done at Land; according to the Course of the Common Law.

And thus much shall serve touching the Court of Admiralty, and the Use of the Civil Law therein.

Thirdly, The Third Court, wherein the 3. The Civil Law has its Use in this Kingdom, is Military the Military Court, held before the Con- Court. stable and Marshal anciently, as the Judiciis Ordinarii in this Case, or otherwise before the King's Commissioners of that Jurisdiction, as Judices Delegati.

The The Latent to Doing the Lountain

http://www.hathitrust.org/access use#pd GMT 16:46 Generated on 2023-03-20 Public Domain / http:/ Its Jurisdistion.

The Matter of their Jurisdiction is declared and limited by the Statutes of 8 R. 2. cap. 5. & 13 R. 2. cap. 2. And not only by those Statutes, but more by the very Common Law is their Jurisdiction declared and limited as follows, viz.

Negative-

First, Negatively: They are not to meddle with any Thing determinable by the Common Law: And therefore, in as much as Matter of Damages, and the Quantity and Determination thereof, is of that Conuzance; the Court of Constable and Marthal cannot, even in fuch Suits as are proper for their Conuzance, give Damages against the Party convicted before them, and at most can only order Reparation in Point of Honour, as Mendacium sibi ipsi imponere: Neither can they, as to the Point of Reparation, in Honour, hold Plea of any fuch Words or Things, wherein the Party is relievable by the Courts of the Common Law.

Affirma-

Secondly, Affirmatively: Their Jurisdiction extends to Matters of Arms and Matters of War, viz.

First, As to Matters of Arms (or Heraldry), the Constable and Marshal had Conuzance thereof, viz. Touching the Rights of Coat-Armour, Bearings, Crests, Supporters, Pennons, &c. And also touching the Rights of Place and Precedence, in Cases where either Acts of Parliament or the King's Patent (he being the Fountain

of

But, Secondly, As to Matters of War. The Constable and Marshal had a double Power, viz.

1. A Ministerial Power, as they were Two great ordinary Officers, anciently, in the King's Army; the Constable being in Effect the King's General, and the Marshal was imployed in marshalling the King's Army, and keeping the Lift of the Officers and Soldiers therein; and his Certificate was the Trial of those whose Attendance was requisite, Vide Littleton, §. 102.

Again, 2. The Constable and Marshal had also a Judicial Power, or a Court wherein feveral Matters were determinable: As 1st, Appeals of Death or Murder committed beyond the Sea, according to the Course of the Civil Law. 2dly, Rights of Prisoners taken in War. 3dly, The Offences and Miscarriages of Soldiers, contrary to the Laws and Rules of the Army: For always preparatory to an actual War, the Kings of this Realm, by Advice of the Constable (and Marshal), were used to compose a Book of Rules and Orders for C 4 the

Digitized by UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

Original from UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

Of Law Martial

the due Order and Discipline of their Officers and Soldiers, together with certain Penalcies on the Offenders; and this was called, Martial Law. We have extant in the Black Book of the Admiralty, and elfewhere, feveral Exemplars of fuch Military Laws, and especially that of the 9th of Rich. 2. composed by the King, with the Advice of the Duke of Lancaster, and others.

But touching the Bufiness of Martial Law, these Things are to be observed, viz.

First, That in Truth and Reality it is not a Law, but fomething indulged rather than allowed as a Law; the Necessity of Government, Order and Discipline in an Army, is that only which can give those Laws a Countenance, Quod enim Necessitas cogit

defendit.

Secondly, This indulged Law was only to extend to Members of the Army, or to those of the opposite Army, and never was fo much indulged as intended to be (executed or) exercised upon others; for others who were not lifted under the Army, had no Colour of Reason to be bound by Military Constitutions, applicable only to the Army; whereof they were not Parts, but they were to be order'd and govern'd according to the Laws to which they were subject, though it were a Time of War.

Thirdly, That the Exercise of Martial Law, whereby any Person should lose his Life or Member, or Liberty, may not be

## Ch. 2. Common Law of England.

permitted in Time of Peace, when the Kings Courts are open for all Persons to receive Justice, according to the Laws of the Land. This is in Substance declared by the Petition of Right, 3 Car. 1. whereby fuch Commissions and Martial Law were repealed and declared to be contrary to Law: And accordingly was that famous Case of Edmond Earl of Kent; who being taken at Pomfret, 15 Ed. 2. the King and divers Lords proceeded to give Sentence of Death against him, as in a kind of Military Court by a Summary Proceeding; which Judgment was afterwards in I Ed. 3. revers'd in Parliament: And the Reason of that Reversal serving to the Purpose in Hand, I shall here insert it as entered in the Record, viz.

Quod cum quicung; bomo ligeus Domini Regis pro Seditionibus, &c tempore pacis captus & in quacung; Curia Domini Regis ductus fuerit de ejusmodi Seditionibus & alius Felonius sibi impositis per Legem & Consuctudine Regni arrectari debet & ad Responsionem adduci, Et inde per Communem Legem, antequam fuerit Morti adjudicand (triari) &c. Unde cum notorium sit & manifestum quod totum tempus quo impositum fuit eidem Comiti propter Mala & Facinora fecisse, ad tempus in quo captus fuit & in quo Morti adjudicatus fuit, fuit tempus Pacus maximæ, Cum per totum tempus predictum & Cancellaria & aliæ plac. Curiæ Domini Regis apertæ fuer' in quibus cuilibet Lex fiebatur sieut fieri consuevit, Nec idem Dominus Rex unquam tempore illo cum vexillis explication

4E

wed nom

of Justice are open.

In this Military Court, Court of Honour, or Court Martial, the Civil Law has been used and allowed in such Things as belong to their Jurisdiction; as the Rule or Direction of their Proceedings and Decifions, so far forth as the same is not controuled by the Laws of this Kingdom, and those Customs and Usages which have obtain'd in England, which even in Matters of Honour are in some Points derogatory to the Civil Law. But this Court has been long disused upon great Reasons.

And thus I have given a brief Prospect of these Courts and Matters, wherein the Canon and Civil Law has been in some Measure allowed, as the Rule or Direction of Proceedings or Decisions: But although in these Courts and Matters the Laws of England, upon the Reasons and Account before expressed, have admitted the Use and Rule of the Canon and Civil Law; yet even herein also, the Common Law of England has retain'd those Signa Superioritatis, and the Preference and Superintendence in relation to those Courts: Namely,

Preheminence of the Common Law.

H.

If. As the Laws and Statutes of the Realm have prescribed to those Courts their Bounds

UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

Original from UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

http://www.hathitrust.org/access\_use#pd

Generated on 2023-03-20 16:46 GMT Public Domain / http://www.hathi

#### Common Law of England. Ch. 2.

Bounds and Limits, fo the Courts of Common Law has the Superintendency over those Courts to keep them within the Limits and Bounds of their feveral Jurisdictions, and to judge and determine whether they have exceeded those Bounds, or not; and in case they do exceed their Bounds, the Courts at Common Law issue their Prohibitions to restrain them, directed either to the Judge or Party, or both: And also, in case they exceed their Jurisdiction, the Officer that executes the Sentence, and in some Cases the Judge that gives it, are punishable in the Courts at Common Law; sometimes at the Suit of the King, sometimes at the Suit of the Party, and sometimes at the Suit of both, according to the Variety and Circumstances of the Case.

2dly. The Common Law, and the Judges of the Courts of Common Law, have the Exposition of such Statutes or Acts of Parliament as concern either the Extent of the Jurisdiction of those Courts (whether Ecclesiastical, Maritime or Military) or the Matters depending before them; and therefore, if those Courts either refuse to allow these Acts of Parliament, or expound them in any other Sense than is truly and properly the Exposition of them, the King's Great Courts of the Common Law (who next under the King and his Parliament have the Exposition of those Laws) may prohibit

and controul them.

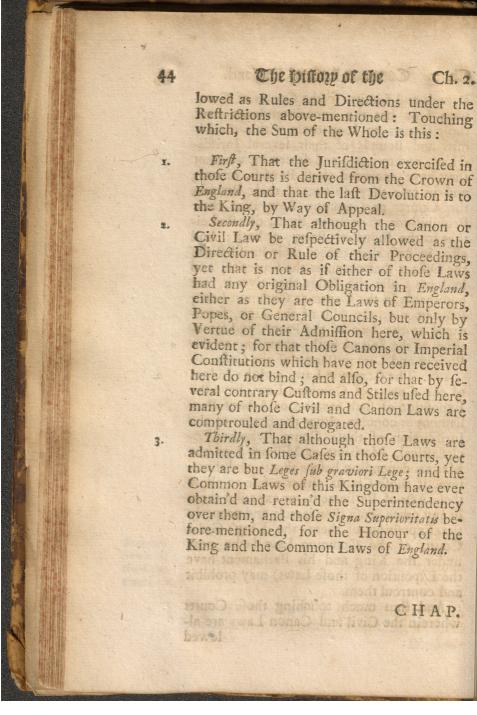
And thus much touching those Courts wherein the Civil and Canon Laws are al-

lowed

43

https://hdl.handle.net/2027/uiuc.8395964

Generated on 2023-03-20 16:46 GMT



#### CHAP. III.

Concerning the Common Law of England, its Use and Excellence, and the Reason of its Denomination.

Come now to that other Branch of our Laws, the common Municipal Law of this Kingdom, which has the Superintendency of all those other particular Laws used in the before-mentioned Courts, and is the common Rule for the Administration of common Justice in this great Kingdom; of which it has been always tender, and there is great Reason for it; for it is not only a very just and excellent Law in it felf, but it is fingularly accommodated to the Frame of the English Government, and to the Disposition of the English Nation, and fuch as by a long Experience and Use is as it were incorporated into their very Temperament, and, in a manner, become the Complexion and Constitution of the English Commonwealth.

Infomuch, that even as in the natural Body the due Temperament and Conflictution does by Degrees work out those accidental Difeases which sometimes happen, and do reduce the Body to its just State and Constitution; so when at any Time through the Errors, Distempers or Iniquities of Men or

Times,

WIE I

Times, the Peace of the Kingdom, and right Order of Government, have received Interruption, the Common Law has wasted and wrought out those Diftempers, and reduced the Kingdom to its just State and Temperament, as our present (and former)

Times can easily witness.

This Law is that which afferts, maintains, and, with all imaginable Care, provides for the Safety of the King's Royal Perfon, his Crown and Dignity, and all his just Rights, Revenues, Powers, Prerogatives and Government, as the great Foundation (under God) of the Peace, Happiness, Honour and Justice, of this Kingdom; and the Law is also, that which declares and afferts the Rights and Liberties, and the Properties of the Subject; and is the just. known, and common Rule of Justice and Right, between Man and Man, within this Kingdom.

And from hence it is, that the Wisdom of the Kings of England, and their great Council, the Honourable Houses of Parliament, have always been jealous and vigilant for the Reformation of what has been at any Time found defective in it, and so to remove all such Obstacles as might obstruct the free Course of it, and to support, countenance and encourage the Use of it, as the best, fafest and truest Rule of Justice in all Matters, as well Criminal as Civil.

I should be too Voluminous to give those feveral Instances that occur frequently in the Statutes, the Parliament Rolls, and

Par-

Parliamentary Petitions, touching this Matter; and shall therefore only instance in some few Particulars in both Kinds, viz. Criminal and Civil: And First, in Matters Civil.

In the Parliament 18 Ed. 1. In a Petition 1. Civil in the Lords House, touching Land between Cases. Hugh Lowther and Adam Edingthorp: The Defendant alledges, That if the Title should in this Manner be proceeded in, he should lose the Benefit of his Warranty; and also, that the Plaintiff, if he hath any Right, hath his Remedy at Common Law by Affize of Mortdancestor, and therefore demands Judgment, Si de Libero Tenemento debeat bic sine brevi Respondere; and the Judgment of the Lords in Parliament thereupon is entered in these Words, viz. Et quia actio de predicto Tenemento petendo & etiam suum recuperare, si quid habere debeat vel possit eidem Ada per Assisam mortis Antecessoris competere debet nec est juri consonum vel bactenus in Curia ista usitat' quod aliquis sine Lege Communi, & Brevi de Cancellaria de libero Tenemento suo respondeat & maxime in Casu ubi Breve de Cancellaria Locum habere potest, dictum est præfato Adæ quod sibi perquirat per Breve de Cancellaria, fi sibi viderit Expederire.

Rot. Parl. 13 R. 2. No 10. Adam Chaucer preferred his Petition to the King and Lords in Parliament, against Sir Robert Knolles, to be relieved touching a Mortgage, which he supposed was satisfied, and to have Restitution of his Lands. The Defendant appeared, and upon the several Allegations on both

Sides,

Sides, the Judgment is thus entered, viz. Et apres les Raisons & les Allegeances de l'un party & de l'autre, y sembles a Seigneurs du Parlement que le dit Petition ne estoit Petition du Parlement, deins que le mattier en icel comprize douit estre discuss per le Commune Ley. Et pur ceo agard suit que le dit Robert iroit eut sans jour & que le dit Adam ne prendroit rien per sa suit icy, eins que il sueroit per le Commune Ley si il luy sembloit ceo faire. Where we may note, the Words are Dovit estre, and not Poet estre discusse per le, &c.

Rot. Parl. 50 Ed. 2. N° 43. A Judgment being given against the Bishop of Norwich, for the Archdeaconry of Norwich, in the Common Bench, the Bishop petitioned the Lords in Parliament, that the Record might be brought into that House, and to be reversed for Error. Et quoy a luy estoit finalement Respondu per common Assent des ils les Justices que si Error y sust si ascun a sine force per le Ley de Angleterre tiel Error fust voire en Parlement immediatement per voy de Error ains en Bank le Roy, & en nul part ailbors, Mais si le Case avenoit que Error fust sait en Bank le Roy adonque ceo serra amendes en Parlement.

And let any Man but look over the Rolls of Parliament, and the Bundles of Petitions in Parliament, of the Times of Ed. I. Ed. II. Ed. III. Hen. IV. H. V. & H. VI. he will find Hundreds of Answers of Petitions in Parliament concerning Matters determinable at Common Law, endorsed with Answers to this, or the like Effect, viz. Suez vous a le

Com-

GMT

16:46

Generated on 2023-03-20 Public Domain / http:/

# Common Law of England.

49

Commune Ley; sequatur ad Communem Legem; Answers Perquirat Breve in Cancellaria fi sibi viderit ex- of Petipedire; ne est Petition du Parlement; Mandetur tions in ista Petitio in Cancellarium, vel Cancellario, vel mene. Fusticiariis de Banco, vel Thesaurario & Baronibus de Scaccario, and the like.

And these were not barely upon the Bene placita of the Lords, but were De jure, as appears by those former Judgments given in the Lords House in Parliament; and the Reason is evident: First, Because if such a Course of Extraordinary Proceeding should be had before the Lords in the first Instance, the Party should lose the Benefit of his Appeal by Writ of Error, according as the Law allows; and that is the Reason, why even in a Writ of Error, or Petition of Error upon a Judgment in any inferior Court. it cannot go per Saltum into Parliament, till it has passed the Court of King's-Bench; for that the First Appeal is thither. Secondly, Because the Subject would by that Means lose his Trial per Pares, and consequently

entitled by Law. And although some Petitions of this Nature have been determined in that Manner, yet it has been (generally) when the Exception has not been started, or at least not infifted upon: And One Judgment in Parliament, that Cases of that Nature ought to be determined according to the Course of the Common Law, is of greater Weight than many Cases to the contrary, wherein the

his Attaint, in case of a Mistake in Point of Issue or Damages: To both which he is

> Question E

Question was not stirred: Yea, even tho' it should be stirred, and the contrary affirm'd upon a Debate of the Question, because greater Weight is to be laid upon the Judgment of any Court when it is exclusive of its Jurisdiction, than upon a Judgment of the same Court in Affirmance of it.

2. Crimi- Now as to Matters Criminal, whether mal Cases. Capital or not, they are determinable by the Common Law, and not otherwise; and in Affirmance of that Law, where the Statutes of Magna Charta, cap. 29. 5 Ed. 3. cap. 9. 25 Ed. 3. cap. 4. 29 Ed. 3. cap. 3. 27 Ed. 3. cap. 17. 38 Ed. 3. cap. 9. 6 40 Ed. 3. cap. 3. The Effect of which is, That no Man shall be put out of his Lands or Tenements, or be imprisoned upon any Suggestion, unless it be by Indicament or Presentment of lawful Men, or by Process at Common Law.

And by the Statute of 1 Hen. 4. cap. 14. it is enacted, That no Appeals be fued in Parliament at any Time to come: This extends to all Accusations by particular Persons, and that not only of Treason or Felony, but of other Crimes and Misdemeanors. It is true, the Petition upon which that Act was drawn up, begins with Appeals of Felony and Treason, but the Close thereof, as also the King's Answer, refers as well to Misdemeanors as Matters Capital; and because this Record will give a great Light to this whole Business, I will here fet down the Petition and the Answer verbatim. Vide Rot. Parl. 1 Hen. 4. No 144.

Item,

http://www.hathitrust.org/access use#pd Generated on 2023-03-20 Public Domain / http:/

https://hdl.handle.net/2027/uiuc.8395964

16:46 GMT

Item, Supplyont les Commens que desore en Petition. avant nul appele de Traison ne de autre Felony 1 Hen. 4. quelconq; soit accept ou receive en le Parlement Nº 144. ains en vous autres Courts de dans vostre Realm dementiers que en vous dits Courts purra estre Terminer come ad ote fait & use ancienement en temps de vous noble Progeniteurs; Et que chescun Person qui en temps a venir serra accuse ou impeach en vostre Parlement ou en ascuns des vos dits Courts per les Seigniors & Commens di vostre Realm ou per ascun Person & defence ou Response & son Accusement ou Empeachment & sur son Response reasonable Record Jugement & Tryal come de ancienement temps ad estre fait & use per les bones Leges de vostre Realm, nient obstant que les dits Empeachements ou Accusements soient faits per les Seigneurs ou Commens de vostre Relme come que de novel en temps de Ric. nadgarius Roy ad estre fait & use a contrar, a tres grand Mischief & tres grand Malevey's Exemple de vostre Realm.

Le Roy voet que de cy en avant toutes les Ap- Answer. peles de choses faits deins le Relme soient tryez & terminez per les bones Leys faits en temps de tres noble Progeniteurs de nostre dit Seigneur le Roy, Et que touts les Appeles de choses faits hors du Realm, soient triez & terminez devant le Constable & Marshal de Angleterre, & que nul Appele soit fait en Parlement desore en ascun temps a venir.

This is the Petition and Answer. The Scat. 14.4. Statute as drawn up hereupon, is general, eap. 14. and runs thus: Item, Pur plusieurs grands Inconveniencies & Mischeifs que plusieurs fait ont ad venues

advenus per colour des plusieurs Appeles faits deins le Realm avant ces heurs ordain est de setabluz, Que desore en avant touts Appeles de choses faits deins le Realm soient tries & termines per les bones Leys de le Realm faits & uses en temps de tres noble Progeniteurs de dit nostre Seigneur le Roy; Et que ils les Appeles de choses faits hors du Realm soient tries & termines devant le Constable & Marshal pur les temps esteant; Et ouster accordes est & assentus que nulls Appeles soient desore faits ou pursues en Partement en nul temps avenir.

Where we may observe, That though the Petition expresses (only) Treason and Felony, yet the Act is general against all Appeals in Parliament; and many Times the Purview of an Act is larger than the Preamble, or the Petition, and so'tis here: For the Body of the Act prohibits all Appeals in Parliament, and there was Reason for it: For the Mischief, viz. Appeals in Parliament in the Time of King Richard II. (as in the Petition is set forth) were not only of Treason and Felony, but of Misdemeanors also, as appears by that great Proceeding, 11 R. 2. against divers, by the Lords Appellants, and confequently it was necesfary to have the Remedy as large as the Mischief. And I do not remember that after this Statute there were any Appeals in Parliament, either for Matters Capital or Criminal, at the Suit of any Particular Person or Persons.

It

Ch. 3.

It is true, Impeachments by the House of Impeach-Commons, fent up to the House of Lords, ments, and Apwere frequent as well after as before this Statute, and that justly, and with good Reason; for that neither the Act nor the Petition ever intended to restrain them, but only to regulate them, viz. That the Parties might be admitted to their Defence to them, and as neither the Words of the Act nor the Practice of After-times extended to restrain such Impeachments as were made by the House of Commons, so neither do thole Impeachments and Appeals agree in their Nature or Reason; for Appeals were nothing else but Accusations, either of Capital or Criminal Misdemeanors, made in the Lords House by particular Persons; but an Impeachment is made by the Body of the House of Commons, which is equivalent to an Indicament pro Corpore Regni, and therefore is of another Nature than an Accufation or Appeal, only herein they agree, viz. Impeachments in Cales Capital against Peers of the Realm, have been ever tried and determined in the Lords House; but Impeachments against a Commoner have not been usual in the House of Lords, unless preparatory to a Bill, or to direct an Indictment in the Courts below: But Impeachments at the Profecution of the House of Commons, for Misdemeanors as well against a Commoner as any other, have usually received their Determinations and final Judgments in the House of Lords; whereof there have been numerous Prece-

E

GMT Generated on 2023-03-20 Public Domain / http:/

dents

dents in all Times, both before and fince the faid Act.

And thus much in general touching the great Regard that Parliaments and the Kingdom have had, and that most justly to the Common Law, and the great Care they have had to preserve and maintain it, as the Common Interest and Birthright of the King and Kingdom.

Appella-Common Law.

I shall now add some few Words touchtion of the ing the Stiles and Appellations of the Common Law, and the Reasons of it: 'Tis called fometimes by Way of Eminence, Lex Terræ, as in the Statute of Magna Charta, cap. 29. where certainly the Common Law is at least principally intended by those Words, aut per Legem Terræ, as appears by the Exposition thereof in several subsequent Statutes, and particularly in the Statute 28 Ed. 2. cap. 2. which is but an Exposition and Declaration of that Statute: Sometimes 'tis called, Lex Anglia, as in the Statute of Merton, cap. . . Nolumus Leges Angliæ mutare, &c. Sometimes 'tis called, Lex & Consuetudo Regni, as in all Commissions of Over and Terminer, and in the Statutes of 18 Ed. 1. cap. . . and De Quo Warranto, and divers others; but most commonly 'tis call'd, The Common Law, or, The Common Law of England, as in the Statute of Articuli super Chartas, cap. 15. in the Statute 25 Ed. 3. cap. 5. and infinite more Records and Statutes.

Now the Reason why 'tis call'd, The Common Law, or what was the Occasion that

first gave that Determination to it, is va- The Rearioufly affigned, viz. fonsthere-

First, Some have thought it to be so called by Way of Contradiffinction to those other Laws that have obtain'd within this Kingdom; as, 1st. By Way of Contradistinction to the Statute Law, thus a Writ of Entry ad Communem Legem, is so call'd in Contradistinction to Writs of Entry in Casu consimili, and in Casu proviso, which are given by Act of Parliament. 2dly, By Way of Contradistinction to particular Customary Laws: Thus Difcents at Common Law, Dower at Common Law, are in Contradistinction to such Dowers and Discents as are directed by particular Customs. And 3dly, In Contradistinction to the Civil, Canon, Martial and Military Laws, which are in some particular Cases and Courts admitted, as the Rule

Secondly, Some have conceived, that the Reason of this Appellation was this, viz. In the beginning of the Reign of Edward III. before the Conquest, commonly called, Edward the Confessor, there were several Laws, and of several Natures, which obtain'd in several Parts of this Kingdom, viz. Mercian Laws, in the Counties of Gloucester, Worcester, Hereford, Warwick, Oxon, Chester, Salop and Stafford. The Danish Laws, in the Counties of York, Derby, Nottingham, Leicester, Lincoln, Northampton, Bedford, Bucks, Hartford, Effex, Middlefex, Norfolk, Suffolk, Cambridge and Huntington. The West-Saxon Laws, in the Counties of Kent, Sussex, Surrey, Berks, E 4 Southamp-

http://www.hathitrust.org/access use#pd Generated on 2023-03-20 16:46 GMT Public Domain / http://www.hathi of their Proceedings.

The Confeffor's Laws.

Southampton, Wilts, Somerset, Dorset, and Devon.

This King, to reduce the Kingdom as well under one Law, as it then was under one Monarchical Government, extracted out of all those Provincial Laws, one Law to be observed through the whole Kingdom: Thus Ranulphus Cestrensis, cited by Sir Henry Spelman in his Gloffary, under the Title, Lex, says, Ex tribus his Legibus Sanctus Edwardus unam Legem .... &c. And the fame in totidem verbis, is affirm'd in his Hiftory of the last Year of the same King Edward. (Vide ibid. plura de boc.) But Hoveden carries up the Common Laws, or those stiled the Confessor's Laws, much further; for he in his History of Henry II. tells us, Quod ift a Leges prius inventa & constituta erant Tempore Edgari, Avi sui, &c. (Vide Hoveden.) And possibly the Grandfather might be the first Collector of them into a Body, and afterwards Edward might add to the Composition, and give it the Denomination of the Common Law; but the Original of it cannot in Truth be referred to either, but is much more ancient, and is as undiscoverable as the Head of Nile: Of which more at large in the following Chapter.

Thirdly, Others fay, and that most truly, That it is called the Common Law, because it is the common Municipal Law or Rule of Justice in this Kingdom: So that Lex Communis, or Jus Communis, is all one and the same with Lex Patria, or Jus Patrium; for although there are divers particular Laws,

iome

http://www.hathitrust.org/access\_use#pd

Generated on 2023-03-20 16:46 Public Domain / http://www.h

some by Custom applied to particular Places, and some to particular Causes; yet that Law which is common to the generality of all Persons, Things and Causes, and has a Superintendency over those particular Laws that are admitted in relation to particular Places or Matters, is Lex Communis Anglia, as the Municipal Laws of other Countries may be, and are fomerimes call'd, The Common Law of that Country; as, Lex Communis Norrica, Lex Communis Burgundica, Lex Communis Lombardica, &c. So that although all the former Reasons have their Share in this Appellation, yet the principal Caufe thereof feems to be the later: And hence fome of Ancients call'd it Lex Communis, others Lex Patriæ; and so they were called in their Confirmation by King William I. Whereof hereafter.

CHAP.

William wall the action and act

#### CHAP. IV.

Touching the Original of the Common Law of England.

THE Kingdom of England being a very ancient Kingdom, has had many Viciffitudes and Changes (especially before the coming in of King William I.) under feveral either Conquests or Accessions of Foreign Nations. For tho' the Britains were, as is fupposed, the most ancient Inhabitants, yet there were mingled with them, or brought in upon them, the Romans, the Picts, the Saxons, the Danes, and lastly, the Normans; and many of those Foreigners were as it were incorporated together, and made one Common People and Nation; and hence arises the Difficulty, and indeed Moral Impossibility, of giving any satisfactory or so much as probable Conjecture, touching the

ficulty of discovering their Original

The Dif-

Original of our Laws, for the following Reasons, viz. First, From the Nature of Laws themselves.

in general, which being to be accommodated to the Conditions, Exigencies and Conveniencies of the People, for or by whom they are appointed, as those Exigencies and Conveniencies do infenfibly grow upon the People, so many times there grows infensibly a Variation of Laws, especially in a long tract of Time; and hence it is, that tho' for the Purpose in some particular Part

# Ch. 4. Common Law of England.

of the Common Law of England, we may easily say, That the Common Law, as it is now taken, is otherwise than it was in that particular Part or Point in the Time of Hen. II. when Glanville wrote, or than it was in the Time of Hen. III. when Bradlon wrote, yet it is not possible to assign the certain Time when the Change began; nor have we all the Monuments or Memorials, either of Acts of Parliament, or of Judicial Resolutions, which might induce or occasion such Alterations; for we have no authentick Records of any Acts of Parliament before 9 H. 3. and those we have of that King's Time, are but few. Nor have we any Reports of Judicial Decisions in any constant Series of Time before the Reign of Edw. I. tho' we have the Plea Rolls of the Times of Hen. III. and King John, in some remarkable Order. So that Use and Custom, and Judicial Decisions and Resolutions, and Acts of Parliament, tho' not now extant, might introduce some New Laws, and alter some Old, which we now take to be the very Common Law it felf, tho' the Times and precise Periods of such Alterations are not explicitely or clearly known: But tho' those particular Variations and Accessions have happened in the Laws, yet they being only partial and fuccessive, we may with just Reason say, They are the same English Laws now, that they were 600 Years fince in the general. As the Argonauts Ship was the fame when it returned home, as it was when it went out, tho' in that long Voyage it had fuc59

fuccessive Amendments, and scarce came back with any of its former Materials; and as Titius is the same Man he was 40 Years since, tho' Physicians tell us, that in a Tract of 7 Years, the Body has scarce any of the same Material Substance it had before.

Secondly, The 2d Difficulty in the Search of the Antiquity of Laws and their Original, is in relation to that People unto whom the Laws are applied, which in the Case of England, will render many Observables, to to shew it hard to be traced. For,

If. It is an ancient Kingdom, and in fuch Cases, tho the People and Government had continued the same ab Origine, (as they say the Chineses did, till the late Incursion of the Tartars) without the Mixture of other People, or Laws; yet it were an impossible Thing to give any certain Account of the Original of the Laws of such a People, unless we had as certain Monuments thereof as the Jews had of theirs, by the Hand of Moses, and that upon the following Accounts, viz.

First, We have not any clear and certain Monuments of the Original Foundation of the English Kingdom or State, when, and by whom, and how it came to be planted. That which we have concerning it, is uncertain and traditional; and since we cannot know the Original of the planting of this Kingdom, we cannot certainly know the Original of the Laws thereof, which may be well presum'd to be very near as ancient as the Kingdom it self. Again, 2dly, Tho

Tra-

Tradition might be a competent Discoverer of the Original of a Kingdom or State, I mean Oral Tradition, yet such a Tradition were incompetent without written Monuments to derive to us, at so long a Distance, the Original Laws and Constitutions of the Kingdom, because they are of a complex Nature, and therefore not orally traducible to fo great a Distance of Ages, unless we had the Original or Authentick Transcript of those Laws, as the People the Jews had of their Law, or as the Romans had of their Laws of the Twelve Tables engraven in Brass. But yet further, 3dly, It is very evident to every Day's Experience, that Laws, the further they go from their original Institution, grow the larger, and the more numerous: In the first Coalition of a People, their Prospect is not great, they provide Laws for their prefent Exigence and Convenience: But in Process of Time, possibly their first Laws are changed, altered or antiquated, as some of the Laws of the Twelve Tables among the Romans were: But whatfoever be done touching their Old Laws, there must of Necessity be a Provision of New, and other Laws succesively, answering to the Multitude of successive Exigencies and Emergencies, that in long Tract of Time will offer themselves; so that if a Man could at this Day have the Prospects of all the Laws of the Britains before any Invasion upon them, it would yet be impossible to fay, which of them were New, and which were Old, and the feveral Seafons and Periods

http://www.hathitrust.org/access\_use#pd Generated on 2023-03-20 16:46 GMT Public Domain / http://www.hath:

riods of Time wherein every Law took its Rise and Original, especially since it appears, that in those elder Times, the Britains were not reduc'd to that civiliz'd Estate, as to keep the Annals and Memorials of their Laws and Government, as the Romans and other civiliz'd Parts of the World have done.

It is true, when the Conquest of a Country appears, we can tell when the Laws of conquering People came to be given to the Conquered. Thus we can tell, that in the Time of Hen. II. when the Conquest of Ireland had obtain'd a good Progress, and in the Time of K. John, when it was compleated, the English Laws were settled in Ireland: But if we were upon this Inquiry, what were the Original of those English Laws that were thus fettled there; we are still under the same Quest and Difficulty that we are now, viz What is the Original of the English Laws. For they that begin New Colonies, Plantations and Conquests; if they fettle New Laws, and which the Places had not before, yet for the most part (I don't fay altogether) they are the Old Laws which obtain'd in those Countries from whence the Conquerors or Planters came.

Secondly, The 2d Difficulty of the Discovery of the Original of the English Laws is this, That this Kingdom has had many and great Vicissitudes of People that inhabited it, and that in their several Times prevail'd and obtain'd a great Hand in the Government of this Kingdom, whereby it came to

4

als

### Ch. 4. Common Law of England.

pass, that there arose a great Mixture and Variety of Laws: In some Places the Laws of the Saxons, in some Places the Laws of the Danes, in some Places the Laws of the ancient Britons, in some Places the Laws of the Mercians, and in some Places, or among some People (perhaps) the Laws of the Normans: For altho', as I shall shew hereafter, the Normans never obtain'd this Kingdom by fuch a Right of Conquest, as did or might alter the Established Laws of the Kingdom, yet confidering that K. William I. brought with him a great Multitude of that Nation, and many Persons of great Power and Eminence, which were planted generally over this Kingdom, especially in the Possessions of such as had oppos'd his coming in, it must needs be suppos'd, that those Occurrences might easily have a great Influence upon the Laws of this Kingdom, and secretly and infensibly introduce New Laws, Customs and Usages: To that altho' the Body and Gross of the Law might continue the lame, and so continue the ancient Denomination that it first had, yet it must needs receive divers Accessions from the Laws of those People that were thus intermingled with the ancient Britains or Saxons, as the Rivers of Severn, Thames, Trent, &c. tho' they continue the same Denomination which their first Stream had, yet have the Accession of divers other Streams added to them in the Tracts of their Paffage which enlarge and augment them. And hence grew those several Denominations of the Saxon, Mercian, and Danish Laws, out

63

out of which (as before is shewn) the Confessor extracted his Body of the Common Law, and therefore among all those various Ingredients and Mixtures of Laws, it is almost an impossible Piece of Chymistry to reduce every Caput Legis to its true Original, as to fay, This is a piece of the Danish, this of the Norman, or this of the Saxon or British Law: Neither was it, or indeed is it much Material, which of these is their Original; for 'tis very plain, the Strength and Obligation, and the formal Nature of a Law, is not upon Account that the Danes, or the Saxons, or the Normans, brought it in with them, but they became Laws, and binding in this Kingom, by Vertue only of their being received and approved here.

Thirdly, A Third Difficulty arises from those accidental Emergencies that happened, either in the Alteration of Laws, or communicating or conveying of them to this Kingdom: For first, the Subdivision of the Kingdom into small Kingdoms under the Heptarchy, did most necessarily introduce a Variation of Laws, because the several Parts of the Kingdom were not under one common Standard, and fo it will foon be in any Kingdoms that are cantonized, and not under one common Method of Dispenfation of Laws, tho' under one and the dame King. Again, The Intercourse and Traffick with other Nations, as it grew more or greater, did gradually make a Communication and Transmigration of Laws from us to them, and from them to us. Agains

#### Ch. 4. Common Law of England.

Again, The growth of Christianity in this Kingdom, and the Reception of Learned Men from other Parts, especially from Rome, and the Credit that they obtained here, might reasonably introduce some New Laws, and antiquate or abrogate some Old ones that seem'd less consistent with the Christian Doctrines, and by this Means, not only some of the Judicial Laws of the Jews, but also some Points relating to, or bordering upon, or derived from the Canon or Civil Laws, as may be seen in those Laws of the ancient Kings, Ina, Alphred, Canu-

tus, &c. collected by Mr. Lambard.

Having thus far premised, it seems, upon the whole Matter, an endless and insuperable Business to carry up the English Laws to their feveral Springs and Heads, and to find out their first Original; neither would it be of any Moment or Use if it were done: For whenever the Laws of England, or the feveral Capita thereof began, or from whence or whomfoever derived, or what Laws of other Countries contributed to the Matter of our Laws; yet most certainly their Obligation arises not from their Matter, but from their Admission and Reception, and Authorization in this Kingdom; and those Laws, if convenient and uleful for the Kingdom, were never the worse, tho' they were defumed and taken from the Laws of other Countries, so as they had their Stamp of Obligation and Authority from the Reception and Approbation of this Kingdom by Vertue of the Common Law, of which F this

Digitized by
UNIVERSITY OF ILLINOIS AT
URBANA-CHAMPAIGN

65

this Kingdom has been always jealous, especially in relation to the Canon, Civil, and Norman Law, for the Reasons hereafter shewn.

Passing therefore from this unsearchable Inquiry, I shall descend to that which gives the Authority, viz. The formal Conftituents, as I may call them, of the Common Law, and they feem to be principally, if not only, those three, viz. 1st, The Common Ulage, or Custom, and Practice of this Kingdom, in fuch Parts thereof as lie in Usage or Custom. 2dly, The Authority of Parliament, introducing fuch Laws; and, 3dly, The Judicial Decisions of Courts of Justice, consonant to one another in the Series and Successions of Time.

1. As to the first of these, Usage and Custom generally received, do Obtinere vim Legis, and is that which gives Power sometimes to the Canon Law, as in the Ecclefiastical Courts; sometimes to the Civil Law, as in the Admiralty Courts; and again, controlles both, when they cross other Customs that are generally received in the Kingdom. This is that which directs Difcents, has fettled some ancient Ceremonies and Solemnities in Conveyances, Wills and Deeds, and in many more Particulars. And if it be inquired, What is the Evidence of this Custom, or wherein it consists, or is to be found? I answer, It is not fimply an unwritten Custom, nor barely Orally derived down from one Age to another; but it is a Custom that is derived down

http://www.hathitrust.org/access use#pd

Generated on 2023-03-20 16:46 GMT Public Domain / http://www.hathi

# Common Law of England.

down in Writing, and transmitted from Age to Age, especially since the beginning of Edw. I. to whose Wisdom the Laws of England owe almost as much as the Laws of

Rome to Justinian.

2. Acts of Parliament. And here it must 24. Stanot be wonder'd at, that I make Acts of tutes. Parliament one of the Authoritative Constituents of the Common Law, tho' I had before contradiftinguished the one from the other; for we are to know, that altho' the Original or Authentick Transcripts of Acts of Parliament are not before the Time of Hen. III. and many that were in his Time are perish'd and lost; yet certainly fuch there were, and many of those Things that we now take for Common Law, were undoubtedly Acts of Parliament, tho' now not to be found of Record. And if in the next Age, the Statutes made in the Time of Hen. III. and Edw. I. were loft, yet even those would pass for Parts of the Common Law, and indeed, by long Usage, and the many Resolutions grounded upon them, and by their great Antiquity, they feem even already to be incorporated with the very Common Law; and that this is so, may appear, tho' not by Records, for we have none so ancient, yet by an authentical and unquestionable History, wherein a Man may, without much Difficulty, find, That many of those Capitula Legum that are now used and taken for Common Law, were Things enacted in Parliaments or Great Councils under William I. and his Predecessors, Kings 事多

Digitized by UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

of England, as may be made appear hereafter. But yet, those Conftitutions and Laws being made before Time of Memory, do now obtain, and are taken as part of the Common Law, and Immemorial Customs of the Kingdom: And so they ought now to be efteem'd, tho' in their first Original they were Acts of Parliament.

3dly. Judicial Decisions.

3. Judicial Decisions. It is true, the Decisions of Courts of Justice, tho' by Vertue of the Law of this Realm they do bind, as a Law between the Parties thereto, as to the particular Cafe in Question, till revers'd by Error or Attaint, yet they do not make a Law properly so called, (for that only the King and Parliament can do); yet they have a great Weight and Authority in in Expounding, Declaring, and Publishing what the Law of this Kindom is, especially when fuch Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former Times; and tho' such Decisions are less than a Law, yet they are a greater Evidence thereof, than the Opinion of any private Persons, as such, whatsoever.

1st, Because the Persons who pronounce those Decisions, are Men chosen by the King for that Employment, as being of greater Learning, Knowledge, and Experience in the Laws than others: 2 dly, Because they are upon their Oaths to judge according to the Laws of the Kingdom. 3dly, Because they have the best Helps to inform their Judgments. 4thly, Because

they

GMT

they do Sedere pro Tribunali, and their Judgments are strengthen'd and upheld by the Laws of this Kingdom, till they are by the same Law revers'd or avoided,

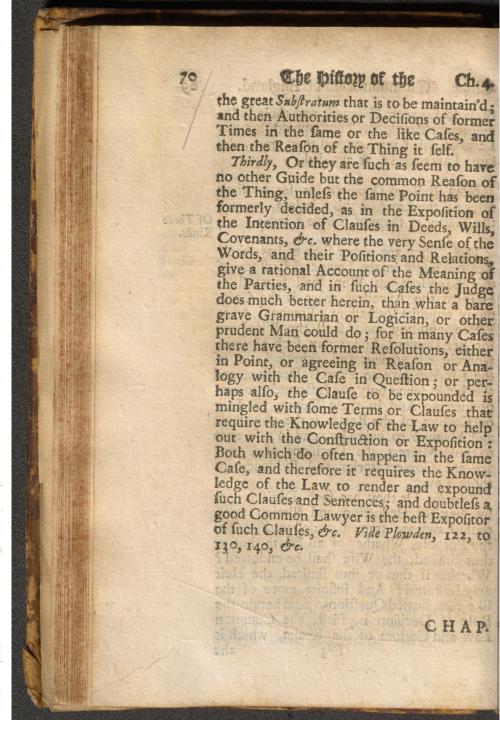
Now Judicial Decisions, as far as they refer to the Laws of this Kindom, are for the Matter of them of Three Kinds:

First, They are either such as have their Reasons singly in the Laws and Customs of this Kingdom, as, Who shall succeed as Heir to the Ancestor, what is the Ceremony requisite for passing a Freehold, what Estate, and how much shall the Wife have for her Dower? And many fuch Matters. wherein the ancient and express Laws of the Kindom give an express Decision, and the Judge feems only the Instrument to pronounce it: And in these Things, the Law or Custom of the Realm is the only Rule and Measure to judge by, and in reference to those Matters, the Decisions of Courts are the Conservatories and Evidences of those Laws.

Secondly, Or they are fuch Decisions, as by way of Deduction and Illation upon those Laws are framed or deduced; as for the Purpose, Whether of an Estate thus or thus limited, the Wife shall be endowed? Whether if thus or thus limited, the Heir may be barr'd? And infinite more of the like complicated Questions. And herein the Rule of Decision is, First, the Common Law and Custom of the Realm, which is F

the

http://www.hathitrust.org/access use#pd Generated on 2023-03-20 Public Domain / http:/



CHAP. V.

How the Common Law of England stood at and for some Time after the coming in of King William I.

T is the Honour and Safety, and therefore Two I the just Desire of Kingdoms that recog- Qualificanize no Superior but God, that their Laws tions of have those two Qualifications, viz. Ift. That the Laws of Engthey be not dependent upon any Foreign land. Power; for a Dependency in Laws derogates from the Honour and Integrity of the Kingdom, and from the Power and Sovereignty of the Prince thereof. Secondly, That they taste not of Bondage or Servitude; for that derogates from the Dignity of the Kingdom, and from the Liberties of the People thereof.

In relation to the former Consideration, the Kings of this Realm, and their great Councils, have always been jealous and careful, that they admitted not any Foreign Power, (especially such as pretended Authority to impose Laws upon other free Kingdoms or States) nor to countenance the Admission of such Laws here as were de-

Rome, as well Ancient as Modern, pretended a kind of Universal Power and Interest; the former by their Victories, F4

http://www.hathitrust.org/access use#pd 16:46 GMT Generated on 2023-03-20 Public Domain / http:/

rived from fuch a Power.

which were large, and extended even to Britain it self; and the later upon the Pretence of being Universal Bishop or Vicar-General in all Matters Ecclefiastical; so that upon Pretence of the former, the Civil Law, and upon Pretence of the later, the Canon Law was introduc'd, or pretended to some kind of Right in the Territories of fome absolute Princes, and among others here in England: But this Kingdom has been always very jealous of giving too much Countenance to either of those Laws, and has always shewn a just Indignation and Refentment against any Encroachments of this Kind, either by the one Law or the other. It it true, as before is shewn, that in the Admiralty and Military Courts, the Civil Law has been admitted, and in the Ecclesiastical Courts, the Canon Law has been in fome Particulars admitted. But still they carry fuch Marks and Evidences them, whereby it may be known that they bind not, nor have the Authority of Laws from themselves, but from the authoritative Admission of this Kingdom.

And, as thus the Kingdom, for the Reafons before given, never admitted the Civil or the Canon Law to be the Rule of the Administration of Common Justice in this Kingdom; fo neither has it endured any Laws to be imposed upon the People by any Right of Conquest, as being unsuitable to the Honour or Liberty of the English Kingdom, to recognize their Laws as given them at the Will and Pleasure of a Con-

queror.

Neither Canon nor Civil Law the Rule of Tuffice here.

Conqueit.

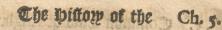
queror. And hence it was, that altho' the Our Laws People unjustly affisted King Hen. IV. in not Imhis Usurpation of the Crown, yet he was not admitted thereunto, until he had Declared, that he claimed not as a Conqueror, but as a Succeffor, only he referved to himfelf the Liberty of extending a Pretence of Conquest against the Scroops that were Slain in Battle against him; which yet he durst not rest upon without a Confirmation. in Parliament. Vide Rot. Parl. I H. 4. Nº 56.

& Pars 2. Ib. No 17.

And upon the like Reason it was, That King William I. tho' he be called the Conqueror, and his attaining the Crown here, is often in History, and in some Records, called, Conquestus Angliæ; yet in Truth it was not fuch a Conquest as did, or could, alter the Laws of this Kingdom, or impose Laws upon the People, per Modum Conquestus, or fure Belli: And therefore, to wipe off that false Imputation upon our Laws, as if they were the Fruit or Effect of a Conquest, or carried in them the Badge of Servitude to the Will of the Conqueror, which Notion some ignorant and prejudiced Persons have entertain'd; I shall rip up, and lay open this whole Business from the Bottom, and to that End enquire into the following Particulars, viz.

1. Of the Thing called Conquest, what it is, when attained, and the Rights thereof.

2. Of



2. Of the feveral Kinds of Conquest, and their Effects, as to the Alteration of Laws by the Victor.

2. How the English Laws stood at the

Entry of King William the First.

4. By what Title he entred, and whether by fuch a Right of Conquest as did, or could, alter the English Laws.

5. Whether De Facto there was any Alteration of the said Laws, and by what Means

after his coming in.

Conquest,

First, Touching the first of these, viz. what it is. Conquest, what it is, when attain'd, and the Rights thereof. It is true, That it feems to be admitted as a kind of Law among all Nations, That in case of a Solemn War between Supream Princes, the Conqueror acquires a Right of Dominion, as well as a Property over the Things and Perfons that are fully conquered; and the Reasons as-

figned are Principally thefe, viz.

1st. Because both Parties have appealed to the highest Tribunal that can be, viz. The Trial by War, wherein the great Judge and Sovereign of the World, The Lord of Hosts, seems in a more especial manner than in other Cases to decide the Controversy. 2dly, Because unless this should be a final Decision, Mankind would be destroy'd by endless Broils, Wars and Contentions; therefore, for the Preservation of Mankind, this great Decision ought to be final, and the Conquer'd ought to acquiesce in it. 2dly, Because if this should not be admitted, and be

be by, as it were, the tacite Consent of Mankind accounted a lawful Acquisition, there would not be any Security or Peace under any Government: For by the various Revolutions of Dominion acquired by this Means, have been, and are to this Day the Successions of Kingdoms and States preferved. What was once the Romans, was before that the Gracians, and before them the Persians, and before the Persians the Assyrians; and if this just Victory were not allowed to be a firm Acquest of Dominion, the present Possessors would be still obnoxious to the Claim of the former Proprietors, and so they would be in a restless State of Doubts, Difficulties and Changes upon the Pretension of former Claims: Therefore, to cut off this Instability and Unsettledness in Dominion and Property, it would feem that the common Consent of all Nations has tacitely submitted, that Acquisition by Right of Conquest, in a Solemn War between Persons not Subjects of each other by Bonds of Allegiance or Fidelity, should be allowed as one of the lawful Titles of acquiring Dominion over the Places and Things fo conquer'd.

But whatever be the real Truth or Justice of this Position, yet we are much at a Loss, touching the Thing in Hypothesi, viz. Whether this be the Effect of every Kind of Conquest? Whether the War be Just or Unjust? What are the Requisites to the Constituting of a just War? Who are the Persons that may acquire? And what are

the

that

https://hdl.handle.net/2027/uiuc.8395964 http://www.hathitrust.org/access\_use#pd Generated on 2023-03-20 16:46 GMT

the Solemnities requisite for that Acquest? But above all, the greatest Difficulty is, when there shall be said, Such a Victory as acquires this Right? Indeed, if there be a total Deletion of every Person of the Opposing Party or Country, then the Victory is compleat, because none remains to call it in question. But suppose they are beaten in one Battle, may they not rally again? Or if the greater Part be subdued, may not the leffer keep their Ground? Or if they do not at the prefent, may they not in the next Age regain their Liberty? Or if they be quiet for a Time, may they not, as they have Opportunity, renew their Pretensions? And altho' the Victor, by his Power, be able to quell and suppress them, yet he is beholding to his Sword for it, and the Right that he got by his Victory before, would not be fufficient without a Power and Force to establish and secure him against new Troubles. And on the other Side, if those few fubdu'd Persons can by Force regain what they once had a Pretence to, a former Victory will be but a weak Defence; and if it would, they would have the like Pretence to a Claim of Acquest by Victory over him, as he had over them.

It feem therefore a difficult Thing to determine in what indivisible Moment this Victory is so compleat, that fure Belli the Acquest of Dominion is fully gotten, and therefore Victors use to secure themselves against Disputes of that Kind, and as it were to under-pin their Acquest Jure Belli,

that they might not be lost by the same Means, whereby they were gained by the Continuation of External Forces of Standing-Armies, Caftles, Garifons, Munitions, and other Acts of Power and Force, fo as thereby to over-bear and prevent an ordinary Possibility of the Prevailing of the conquered or subdued People, against the Conqueror or Victor. He that lays the Weight of his Title upon Victory or Conquest, rarely rests in it as a compleat Conquest, till he has added to it somewhat of Consent or Faith of the Conquered, submitting voluntarily to him, and then, and not till then, he thinks his Title fecure, and his Conquest compleat: And indeed, he has no Reason to think his Title can be otherwife fecure; for where the Title is meerly Force or Power, his Title will fail, if the Conquered can with like Force or Power overmatch his, and so regain their former Interest or Dominion.

Now this Consent is of Two Kinds, either Consent. Express'd, or Imply'd. An Express Consent 1. Express is, when after a Victory the Party con-ted. quered do exprelly submit themselves to the Victors, either simply or absolutely, by Dedition, yielding themselves, giving him their Faith and their Allegiance; or else under certain Pacts, Conventions, Agreements, or Capitulations, as when the Subdued Party, either by themselves, or by Substitutes, or Delegates by them chosen, do yield their Faith and their Allegiance to the Victor upon certain Pacts or Agreements

UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

Original from UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

deter-

http://www.hathitrust.org/access use#pd Generated on 2023-03-20 16:46 GMT

ments between them; as for holding or continuing their Religion, their Laws, their Form of Civil Administration, &c.

And thus, tho' Force were perhaps the Occasion of this Consent, yet in truth 'tis Confent only that is the true proximate and fix'd Foundation of the Victor's Right; which now no longer rests barely upon external Force, but upon the express Consent and Pact of the subdu'd People, and consequently this Pact or Convention is that which is to be the immediate Foundation of that Dominion; and upon a diligent Obfervation of most Acquests gotten by Conquest, or so called, we shall find this to be the Conclusion of almost all Victories, they end in Deditions and Capitulations, and Faith given to the Conqueror, whereby oftentimes the former Laws, Privileges, and Possessions are confirmed to the Subdued, without which the Victors feldom continue long or quiet in their New Acquests, without extream Expence, Force, Severity and Hazard.

An implied Confent is, when the Subdued do continue for a long Time quiet and peaceable under the Government of the Victor, accepting his Government, submitting to his Laws, taking upon them the Offices and Employments under him, and obeying and owning him as their Governor, without opposing him, or claiming their former Right. This seems to be a tacite Acceptance of, and Assent to him; and tho' this is gradual, and possibly no

2. Implied.

But still all this is intended of a lawful Conquest by a Foreign Prince or State, and not an Usurpation by a Subject, either upon his Prince or Fellow Subject; for feveral Ages and Descents do not purge the

Unlawfulness of such an Usurpation.

Secondly, Concerning the feveral Kinds of 2. The Conquests, and their Effects, as to the Al-Kinds and teration of Laws by the Victor. There Effects of feems to be a double kind of Conquest, which induces a various Confideration touching the Change of Laws, viz. Victoria in Regem & Populum, & Victoria in Regem tantum. The Conquest over the People or Country, is when the War is denounced by a Prince or State Foreign, and no Subject, and when the Intention and Denunciation of the War is against the King and People or Country, and the Pretension of Title is by the Sword, or Jure Belli; such were most of the Conquests of ancient Monarchs, viz. The Assyrian, Persian, Gracian, and Roman Conquests; and in such Cases, the Acquisitions of the Victor

Victor were absolute and universal, he gain'd the Interest and Property of the very Soil of the Country subdued; which the Victor might, at his Pleasure, give, sell or arrent: He gain'd a Power of abolishing or changing their Laws and Customs, and of giving New, or of imposing the Law of the Vi-Aor's Country. But although this the Conqueror might do, yet a Change of the Laws of the conquered Country was rarely univerfally made, especially by the Romans: Who, though in their own particular Colonies, planted in conquered Countries, they obferved the Roman Law, which possibly might by Degrees, without any rigorous Imposition, gain and infinuate themselves into the conquered People, and fo gradually obtain, and insensibly conform them, at least fo many of them as were conterminous to the Colonies and Garifons to the Roman Laws; yet they rarely made a rigorous and universal Change of the Laws of the conquered Country, unless they were such as were foreign and barbarous, or altogether inconsistent with the Victor's Government: But in other Things, they commonly indulged unto the Conquered, the Laws and Religion of their Country upon a double Account, viz.

First, On Account of Humanity, thinking it a hard and over-severe Thing to impose prefently upon the Conquered a Change of their Customs, which long Use had made dear to them. And, 2dly, Upon the Account

and experienced People, found that those mans in-Indulgences made their Conquests the more dulged eafy, and their Enjoyments thereof the more the vanfirm, when as a rigorous Change of the Laws their and Religion of the People would render Laws and them in a restless and unquier Condition, Religion. and ready to lay hold of any Opportunity of Defection or Rebellion, to regain their ancient Laws and Religion, which ordinary People count most dear to them; (though at this Day the Indulgence of a Paganish Religion is not used to be allowed by any Christian Victor, as is observed in Calvin's Case in the Seventh Report;) and to give One Instance for all, it was upon this Account, That though the Romans had wholly fubdued Syria and Palestina, yet they allow'd to the Inhabitants the Jews, &c. the Use of their Religion and Laws, fo far forth as confifted with the Safety and Security of the Victor's Interest: And therefore, though they referved to themselves the Cognizance of fuch Causes as concern'd themselves, their Officers or Revenues, and fuch Cafes as might otherwise diffurb the Security of

their Empire, as Treasons, Insurrections,

and the like; yet 'tis evident they indulged the People of the Jews, &c. to judge by their own Law, not only of fome Criminal Proceedings, but even of Capital in some Cases, as appears by the History of the

Gospels, and Acts of the Apostles.

Conquest of Prudence; for the Romans being a wife The Ro-

But

The history of the Ch. 5.

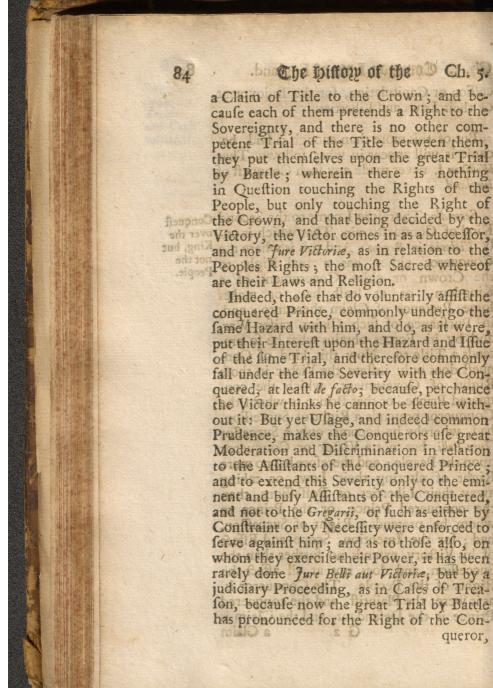
Conquest

But still this was but an Indulgence, and Terms therefore was resumable by the Victor, unand Capi- less there intervened any Capitulation betulations, tween the Conqueror and the Conquered mis directo the contrary; which was frequent, esperisdicially in those Cases, when it was not a compleat Conquest, but rather a Dedition upon Terms and Capitulations, agreed between the Conqueror and the Conquered; wherein usually the yielding Party secured to themselves, by the Articles of their Dedition, the Enjoyment of their Laws and Religion; and then by the Laws of Nature and of Nations, both which oblige to the Observation of Faith and Promises, those Terms and Capitulations were to be obferved. Again, 2dly, When after a full Conquest, the conquered People resumed so much Courage and Power as began to put them in a Capacity of regaining their former Laws and Liberties. This commonly was the Occasion of Terms and Capitulations between the Conquerors and Conque-Again, 3dly, When by long Succession of Time, the Conquered had either been incorporated with the conquering Peo. ple, whereby they had worn out the very Marks and Discriminations between the Conquerors and Conquered; and if they continued distinct, yet by a long Prescription, Ulage and Cultom, the Laws and Rights of the conquered People were in a manner settled, and the long Permission of the Conquerors amounted to a tacite Concession cession or Capitulation, for the Enjoyment of their Laws and Liberties.

But of this more than enough is faid, because it will appear in what follows, That William I. never made any fuch Conquest of England.

Secondly, Therefore I come to the Second Conquest Kind of Conquest, viz. That which is on- over the ly Victoria in Regem: And this is where the King, but Conqueror either has a real Right to People. the Crown or chief Government of a Kingdom, or at least has, or makes some Pretence of Claim thereunto; and, in Pursuance of such Claim, raises War. and by his Forces obtains what he fo pretends a Title to. Now this kind of Conquest does only instate the Victor in those Rights of Government, which the conquered Prince, or that Prince to whom the Conqueror pretends a Right of Succession, had, whereby he becomes only a Successor Fure Belli, but not a Victor or Conqueror upon the Peeple; and therefore has no more Right of altering their Laws, or taking away their Liberties or Possessions, than the conquered Prince, or the Prince to whom he pretends a Right of Succession, had; for the Intention, Scope and Effect of his Victory extends no further than the Succession, and does not at all affect the Rights of the People. The Conqueror is, as it were, the Plaintiff, and the conquered Prince is the Defendant, and the Claim is G 2.

http://www.hathitrust.org/access use#pd 16:46 GMT Generated on 2023-03-20 Public Domain / http:/



queror, and at best no Man must dare to lay otherwise now, whatsoever Debility was in his Pretention or Claim. We shall see the Instances hereof in what follows.

Thirdly, As to the Third Point, How the 3d. Que. Laws of England stood at the Entry of King fion. William I. And it feems plain, that at the Laws Time of his Entry into England, the Laws, flood at commonly call'd, The Laws of Edward the W. I.'s Confessor, were then the standing Laws of Entry. the Kingdom. Hoveden tells us, in a Digression under his History of King Henry II. that those Laws were originally put together by King Edgar, who was the Confessor's Grandfather, viz- Verum tamen post mortem ipsius Regis Edgari usq; ad Coronationem Sancti Regis Edvardi quod Tempus Continet Sexaginta & Septem Annos prece (vel pretio) Leges sopitæ sunt & tus prætermissæ sed postquam Rex Edvardus in Regno fuit sublimatus Concilio Baronum Angliæ Legem Annos Sexaginta & Septem Sopitam, excitavit & confirmavit, & ea Lex sic confirmata vocata est Lex Sancti Edvardi, non quod ipse prius invenisset eam sed cum prætermissa fuisset & oblivioni penitus dedita a morte avi sui Regis Edgari qui primus inventor ejus fuisse dicitur usque ad sua Tempora, viz. Sexaginta & Septem Annos. And the same Passage in totidem Verbis is in the History of Lichfield, cited in Sir Robert Twisden's Prologue to the Laws of King William I. But although possibly those Laws were collected by King Edgar, yet it is evident, by what is before faid, they were augmented by the Confessor, by that Extract

http://www.hathitrust.org/access use#pd GMT Generated on 2023-03-20 Public Domain / http:/

tiow the

tract of Laws before-mentioned, which he made out of that Threefold Law, that obtain'd in Several Parts of England, viz. The Danish, the Mercian, and the West-Saxon Laws.

This Manual (as I may call it) of Laws, stiled, The Confessor's Laws, was but a small Volume, and contains but few Heads, being rather a Scheme or Directory touching some Method to be observed in the Distribution of Justice, and some particular Proceedings relative thereunto, especially in Matters of Crime, as appears by the Laws themselves, which are now printed in Mr. Lambart's Saxon Laws, p. 133. and other Places; yet the English were very zealous for them. no less or otherwise than they are at this Time for the Great Charter; infomuch, that they were never fatisfied till the faid Laws were reinforced and mingled for the most Part with the Coronation Oath of King William I. and some of his Successors.

And this may serve shortly touching this Third Point, whereby we fee that the Laws that obtain'd at the Time of the Entry of King William I. were the English Laws, and principally those of Edward the Confessor.

ftion. What

kind of made.

4th Que- Fourthly, The Fourth Particular is, The Pretentions of King William I. to the Crown of England, and what kind of Conquest he made; and this will be best rendered and Conquest understood by producing the History of that William I. Business, as it is delivered over to us by the ancient Historians that lived in or pear

that

that Time: The Sum, or Totum whereof, is this.

King Edward the Confessor having no Children, nor like to have any, had Three and low Persons related to him, whom he principally favoured, viz. Ift, Edgar Atheling, the Son of Edward, the Son of Edmond Ironside, Mat. Paris, Anno 1066. Edmundus autem latus ferreum Rex naturalis de stirpe Regum gennit Edwardum & Edwardus genuit Edgarum cui de jure debebatur Regnum Anglorum. 2dly, Harold, the Son of Goodwin, Earl of Kent, the Confessor's Father-in-Law, he having married Earl Goodwin's Daughter: And, 3dly, William Duke of Normandy, who was allied to the Confessor thus, viz. William was the Son of Robert, the Son of Richard Duke of Normandy, which Richard was Brother unto the Confessor's Mother. Vide Hoveden, sub initio Anni primi Willielmi primi.

There was likewise a great Familiarity, as well as this Alliance, between the Confessor and Duke William; for the Confessor had often made considerable Residencies in Normandy. And this gave a fair Expectation to Duke William of succeeding him in this Kingdom: And there was also, at least pretended, a Promise made him by the Confessor, That Duke William should succeed him in the Crown of England; and because Harold was in great Favour with the King, and of great Power in England, and therefore the likeliest Man by his Assistance to advance, or by his Opposition to hinder or emperate the Duke's Expectation, there

G4 was

was a Contract made between the Duke and Harold in Normandy in the Confessor's Lifetime, That Harold should, after the Confessor's of England Death, affift the Duke in obtaining the Crown of England. (Vide Brompton, Hoveden, &c.) Shortly after which the Confessor died, and then step'd up the Three Competitors to the Crown, viz.

> 1. Edgar Atheling, who was indeed favoured by the Nobility, but being an Infant, was overborn by the Power of Harold, who thereupon began to fet up for himfelf: Whereupon Edgar, with his Two Sifters, fled into Scotland; where he, and one of his Sifters, dying without Issue, Margaret, his other Sifter and Heir, married Malcolm, King of Stots; from whence proceeded the Race of the Scottish Kings, and from whom Her present Majesty Queen Anne is derived in a direct and uninterrupted Line.

2. Harold, who having at first raised a Power under Pretence of Supporting and preferving Duke William's Title to this Kingdom, and having by Force suppress'd Edgar, he thereupon claimed the Crown to himfelf; and pretending an Adoption or Bequest of the Kingdom unto him by the Confessor, he forgot his Promise made to Duke William, and usurped the Crown, which he held but the Space of 9 Months and A Days, Howeden. 18919 0

3. William, Duke of Normandy, who pretended a Promise of Succession by the Confessor, and a Capitulation or Stipulation by Harold for his Affistance; and had, it seems, PEW

http://www.hathitrust.org/access use#pd Generated on 2023-03-20 16:46 GMT

fo far interested the Pope in Favour of his Pretentions, that he pronounced for William

against both the others.

Hereupon the Duke makes his Claim to the Crown of England, gathered a powerful Army, came over, and upon the 14th of October, Anno 1067. gave Harold Battle, and overthrew him at that Place in Suffex, where William afterwards founded Battle-Abbey, in Memory of that Victory; and then he took upon him the Government of the Kingdom, as King thereof, and upon Christmas following was folemnly crown'd at Westminster by the Archbishop of York; and he declared at his Coronation, That he claimed the Crown not Jure Belli, but Jure Successionis; and Brompton gives us this Account thereof, Cum nomen Tyranni exhorresceret & nomen legitimi principis inducre vellet petiit consecrari; and accordingly, says the same thor, the Archbishop of York, in respect of some present Incapacity in the Archbishop of Canterbury, Munus boc adimplevit ipsumg; Gulielmum Regem ad jura Ecclefia Anglicana tuenda & conservanda populumque suum recte regendum, & Leges rectas Statuendum, Sacramento solemniter adstrinxit; and thereupon he took the Homage of the Nobility.

This being the true, though short Account of the State of that Business, there necessarily follows from thence those plain

and unquestionable Consequences.

First, That the Conquest of King William I. was not a Conquest upon the Coun-

try

try or People, but only upon the King of it, in the Person of Harold, the Usurper; for William I. came in upon a Pretence of Title of Succession to the Confessor; and the Profecution and Success of the Battle he gave to Harold was to make good his Claim of Succession, and to remove Harold, as an unlawful Usurper upon his Right; which Right was now decided in his Favour, and determined by that great Trial

by Battle.

Secondly, That he acquired in Confequence thereof no greater Right than what was in the Confessor, to whom he pretended a Right of Succession; and therefore could no more alter the Laws of the Kingdom upon the Pretence of Conquest, than the Confessor himself might, or than the Duke himself could have done, had he been the true and rightful Successor to the Crown, in Point of Descent from the Confessor; neither is it material, whether his Pretence were true or false, or whether, if true, it were available or not, to entitle him to the Crown; for whatfoever it was, it was fufficient to direct his Claim, and to qualify his Victory so, that the Fus Belli thereby acquired could be only Victoria in Regem, sed non in Populum, and put him only in the State, Capacity and Qualification of a Succeffor to the King, and not as Conqueror of the Kingdom.

Thirdly, And as this his antecedent Claim kept his Acquest within the Bounds of a Successor, and restrained him from the un-

limited

GMT

Generated on 2023-03-20 16:46 Public Domain / http://www.h

limited Bounds and Power of a Conqueror; fo his subsequent Coronation, Coronaand the Oath by him taken, is a fur-tion Oath. ther unquestionable Demonstration, that he was restrain'd within the Bounds of a Successor, and not enlarged with the Latitude of a Victor; for at his Coronation, he binds himself by a Solemn Oath to preserve the Rights of the Church, and to govern according to the Laws, and not absolutely and unlimittedly according to the Will of a Conqueror.

Fourthly, That if there were any Doubt whether there might be fuch a Victory as might give a Pretension to him, of altering Laws, or governing as a Conqueror; yet to secure from that possible Fear, and to avoid it, he ends his Victory in a Capitulation; namely, he takes the ancient Oath of a King unto the People, and the People reciprocally giving or returning him that Affurance that Subjects ought to give their Prince, by performing their Homage to him as their King, declared by the Victory he had obtain'd over the Usurper, to be the Successor of the Confessor: And consequently, if there might be any Pretence of Conquest over the Peoples Rights, as well as over Harold's, yet the Capitulation or Stipulation removes the Claim or Pretence of a Conqueror, and enstates him in the regulated Capacity and State of a Successor. And upon all this it is evident, That King William I. could not abrogate or alter the ancient Laws of the Kingdom, any more than if he

4.

Digitized by UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

# The Theiristory of the Chis

he had succeeded the Confessor as his lawfull Heir, and had acquir'd the Crown by the peaceable Course of Descent, without any Sword drawn.

And thus much may fuffice, to shew that King William I. did not enter by fuch a Right of Conquest, as did or could alter

the Laws of this Kingdom.

5th. Queflion. ter'd the Laws.

Therefore I come to the last Question I proposed to be considered, viz. Whether de Whether Facto there was any Thing done by King William I. after his Accession to the Crown, in reference either to the Alteration or Confirmation of the Laws, and how and in what Manner the same was done: And this being a Narrative of Matters of Fact, I shall divide into those Two Inquiries, Viz. 1ft. What was done in relation to the Lands and Poffessions of the English: And 2dly. What was done in relation to the Laws of the Kingdom in general; for both of these will be necessary to make up a clear Narrative touching the Alteration or Suspension, Confirmation or Execution of the Laws of this Kingdom by him.

First, Therefore touching the former, viz. What was done in relation to the Lands and Possessions of the English. Those Two Things must be premised, viz. First, a Matter of Right, or Law; which is this, That in case this had been a Conquest upon the Kingdom, it had been at the Pleafure of the Conqueror to have taken all the Lands of the Kingdom into his own Posselfion, to have put a Period to all former

Titles,

Titles, to have cancelled all former Grants, and to have given, as it were, the Date and Original to every Man's Claim, so as to have been no higher nor ancienter than such his Conquest, and to hold the same by a Title derived wholly from and under him. Ido not say, that every absolute Conqueror of a Kingdom will do thus, but that he may if he will, and have Power to effect it.

Secondly, The Second Thing to be premised is, a Matter of Fact, which is this; That Duke William brought in with him a great Army of Foreigners, that would have expected a Reward of their Undertaking, and therefore were doubtless very craving and importunate for Gratifications to be made them by the Conqueror Again, it is very probable, that of the English themselves there were Persons of very various Conditions and Inclinations; some perchance did adhere to the Duke, and were Affiftant to him openly, or at least under-hand, towards the bringing him in; and those were fure to enjoy their Possessions privately and quietly when the Duke prevailed. some did without all Question adhere to Harold, and those in all probability were severely dealt with, and disposses'd of their Lands, unless they could make their Peace. Again, possibly there were others who affifted Harold, partly out of Fear and Compulsion; yet those, possibly, if they were of any Note or Eminence, fared little better than the rest. Again, there were some that

What was done after the Conquest.

93

2.

pro-

probably flood Neuters, and medled not: and those, though they could not expect much Favour, yet they might in Justice expect to enjoy their own. Again, it must needs be supposed, That the Duke having fo great an Army of Foreigners, fo many Ambitious and Covetous Minds to be fatisfied, so many to be rewarded in Point of Gratitude; and after so great a Concussion as always happens upon the Event of a Victory, it must needs, upon those and suchlike Accounts, be evident to any Man that confiders Things of this Nature, that there were great Outrages and Oppressions committed by the Victor's Soldiers and their Officers, many false Accusations made against innocent Persons, great Disturbances and Evictions of Possessions, many right Owners being unjustly thrown out, and confequently many Occupations and Usurpations of other Men's Rights and Posses sions, and a long while before those Things could be reduced to any quiet and regular Settlement.

What was the Conquest.

These general Observations being predone after mised, we will now see what de Facto was done in relation to Men's Possessions, in Consequence of this Victory of the Duke.

First, It is certain that he took into his Hands all the Demeasn Lands of the Crown which were belonging to Edward the Confessor at the Time of his Death, and avoided all the Dispositions and Grants thereof made

UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

Original from UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

made by Harold, during his short Reign; and this might be one great End of his making that Noble Survey in the Fourth Year of his Reign, called generally Doomsday-Read, in some Records, as Rot. Winton, &c. thereby to ascertain what were the Possessions of the Crown in the Time of the Confessor, and those he entirely refumed: And this is the Reason why in some of our old Books it is said, Ancient Demeasn is that which was held by King William the Conqueror; and in others'tis faid, Ancient Demeasn is that which was held by King Edward the Confessor, and both true in their Kind; and in this Respect, viz. That whatfoever appeared to be the Confessor's at the Time of his Death, was assumed by King William into his own Possesnon.

Secondly, It is also certain, That no Perfon simply, and quaterus an English Man, was disposses'd of any of his Possessions, and consequently their Land was not pretended unto as acquired Jure Belli, which appears most plainly by the following Evidences, viz.

First, That very many of those Persons that were possessed of Lands in the Time of Edward the Confessor, and so returned upon the Book of Doomsday, retain'd the same unto them and their Descendants, and some of their Descendants retain the same Possessesses to this Day, which could not have been, if presently Jure Belli ac Victoria uni-

95 2:

universalis, the Lands of the English had been vested in the Conqueror. And again,

Secondly, We do find, that in all Times, even fuddenly after the Conquest, the Charters of the ancient Saxon Kings were pleaded and allowed, and Titles made and created by them to Lands, Liberties, Franchifes, and Regalities, affirm'd and adjudged under William I. Yea, when that Exception has been offered, That by the Conquest those Charters had lost their Force, yet those Claims were allowed as in 7 E. 2. as mentioned by Mr. Selden, in his Notes upon Eadmerus, which could not be. if there had been such a Conquest as had vested all Mens Rights in the Conqueror.

Thirdly, Many Recoveries were had shortly after this Conquest, as well by Heirs as Succeffors of the Seizin of their Predeceffors before the Conquest. We shall take one or two Instances for all; namely, that famous Record apud Pinendon, by the Archbishop of Canterbury, in the Time of King William I. of the Seizin and Title of his Predecessors before the Conquest: See the whole Process and Proceedings thereupon in the End of Mr. Selden's Notes upon Eadmerus; and fee Spelman's Gloffary, Title Drenches. Upon these Instances, and much more that might be added, it is without Contradiction, That the Rights and Inheritances of the English qua Tales, were not abrogated or impeach'd by this Conquest, but continued notwithstanding the same; for, as is before observ'd, it was fure Belli quoad Regem, Sed non quoad Populum.

But

But to descend to some Particulars: The What English Persons that the Conqueror had to Persons William I. deal with, were of Three Kinds, viz. First, disposses-Such as adhered to him against Harold the ed. Usurper; and, without all Question, those continued the Possession of their Lands, and their Possessions were rather encreased by him, than any way diminished. Secondby, Such as adhered to Harold, and opposed the Duke, and fought against him; and doubless, as to those, the Duke after his Victory used his Power, and disposses'd them of their Estates: Which Thing is usual upon all Conclusions and Events of this Kind, upon a double Reason; 1st, To secure himself against the Power of those that oppos'd him, and to weaken them in their Estates, that they should not afterwards be enabled to make Head against him. 2dly, To gratifie those that affisted him, and to reward their Services in that Expedition; and to make them firm to his Interest, which was now twisted with their own: For it can't be imagined, but that the Conqueror was affifted with a great Company of Foreigners, some that he favour'd, some that had highly deserved for their Valour, some that were necessitous Soldiers of Fortune, and others that were either ambitious or covetous: All whose Desires, Deferts, or Expectations, the Conqueror had no other Means to fatisfie, but by the Estates of such as had appeared open Enemies to him; and doubtless, many innocent Persons suffered in this Kind, under false Sug-H

Suggestions and Accusations, which occafioned great Exclamations by the Writers of those Times against the Violencies and Oppressions which were used after this Victory. And, Thirdly, Such as stood Neuters, and meddled not on either Side during the Controversie: And doubtless, for some Time after this great Change, many of those suffered very much, and were hardly used in their Estates, especially such as were of the

more Eminent Sort.

Gervasius Tilburiensis, who wrote in the Time of Hen. II. Libro 1º Cap. Quid Murdrum & quare sic dictum, gives us a large Account of what he had traditionally learned touching this Matter, to this Effect, viz. Post Regni Conquisitionem & Perduellium Subjestionem, &c. Nomine autem Successionis a temporibus subactæ Gentis nibil sibi Vendicarent, &c. i. e. After the Conquest of the Kingdom, and Subjection of the Rebels, when the King himself and his great Men had furveyed their new Acquisitions; and strict Inquiry was made, who there were that, fighting against the King, had saved themfelves by Flight: From these, and the Heirs of fuch as were flain in Battle, fighting against him, all hopes of Succession, or of possessing their Estates; for the People being subdued, they held their Lives as a Favour, Oc.

But Gervase, as he speaks so liberally in relation to the Conquest, and the Subacta Gens, as he terms us; so it should feem, he was in great Measure mistaken in this Re-

lation:

lation: For it is most plain, That those that Lands of were not engaged visibly in the Affistance Neuters of Harold, were not, according to the Rules of those Times, disabled to enjoy their Posfessions, or make Title of Succession to their Ancestors, or transmit to their Posterity as formerly, tho' possibly some Oppressions might be used to particular Persons here and there to the contrary. And this appears by that excellent Monument of Antiquity, set down in Sir H. Spelman's Gloffary, in the Title of Drenches or Drenges, which I shall here transcribe, viz.

Edwinus de Sharborne, Et quidam alii qui ejecti fuerunt & Terris suis abierunt ad conquestorem & dixerunt ei, quod nunquam ante conquestum nec in conquestum nec post, fuerunt contra Regem ipsum in Concilio aut in auxilio sed tenuerunt se in pace, Et hoc parati sunt probare qualiter Rex vellet Ordinare, Per quod idem Rex facit Inquiri per totam Angliam si ita fuit, quod quidem probatum fuit, propter quod idem Rex præcepit ut omnes illi qui sic tenuerunt se in pace in forma prædicta quod ipsi rehaberent omnes Terras & Dominationes suas adeo integre & in pace ut unquam habuerunt vel tenuerunt ante conquestum suum, Et quod ipsi in posterum vocarentur Drenges.

But it feems the Possessions of the Church Church were not under this Discrimination, for Lands not they being held not in Right of the Per- Confiscafon, but of the Church, were not subject to any Confiscation by the Adherence of the H 2 Pol-

not For-

99

Possessor to Harold the Usurper: And therefore, tho' it seems Stigand Archbishop of Canterbury, at the coming in of William I. had been in some Opposition against him, which probably might be the true Caufe why he perform'd not the Office of his Coronation, which of Right belonged to him, tho' some other Impediments were pretended, Vide Eadmerus in initio Libri, and might also possibly be the Reason why a confiderable part of his Possessions were granted to Odo Bishop of Bayonne, but were afterwards recovered by Lanfrank, his Successor, at Pinendon, in pleno Comitatu, ubi Rex præcepit totum Comitatum absque mora considere, & homines Comitatûs omnes Francigenos & præcipue Anglos in antiquis Legibus & Consuetur dinibus peritos, in unum convenire.

To this may be added those several Grants and Charters made by King William I. mentioned in the History of Ely, and in Eadmerms, for Restoring to Bishopricks and Abbies such Lands, or Goods, as had been taken away from them, viz.

Charters
for restoring
Lands to
Churches
&c.

Church

ted.

Willielmus Dei gratia Rex Anglorum, Lanfranco Archiepiscopo Cantuar' & Galfrido Episcopo Constantiarum & Roberto Comiti de ou &
Richardo filio Comitis Gileberti & Hugoni de
Monteforti, suisque aliis proceribus Regni Angliæ
salutem. Summonete Vicecomites meos ex meo præcepto, & ex parte mea eis dicite ut reddant Episcopatibus meis & Abbatiis totum Dominium omnesque Dominicas terras quas de Dominio Episcopatuum meorum, & Abbatiarum, Episcopi mei &
Abbates

Abbates eis vel lenitate vel timore vel cupiditate dederunt vel habere consenserunt vel ipst violentia sua inde abstraxerunt, & quod hactenus injuste possiderunt de Dominio Ecclesiarum mearum. Et nisireddiderint sicut eos ex parte mea summonebitis, vos ipsos velint nolint, constringite reddere; Et quod si quilibet alius vel aliquis vestrum quibus hanc Justitiam imposui ejustem querelæ suent reddat similiter quod de Domino Episcopatuum vel Abbatiarum mearum habuit ne propter illud quod inde aliquis vestrum habebit, minus exerceat super meos Vicecomites vel alios, quicunque teneant Dominium Ecclesiarum mearum, quod Præcipio, &c.

Willielmus Rex Anglorum omnibus suis fidelibus suis & Vicecomitibus in quorum Vicecomitatibus Abbatia de Heli Terras habet salutem. Præcipio ut Abbatia pred. habeat Omnes consuitudines suas scilicet Saccham & Socham Toll & Team & Infanganetheof, Hamsocua & Grithbrice Fithwite & Ferdwite infra Burgum & extra & omnes alias forisfacturas in terra sua super suos homines sicut habuit Die qua Rex Edwardus fuit vivus & mortuus, & sicut mea jussione dirationatæ apud Keneteford per plures Scyras ante meos Barones, viz. Galfridum Constantientem Ep. & Baldewine Abbatem, &c. Teste Rogero Bigot.

Willielmus Rex Angl. Lanfranco Archiepo', & Rogero Comiti Moritoniæ, & Galfrido Constantien Epo. salutem. Mando wobis & Præcipio ut iterum faciatis congregari omnes Scyras quæ interfuerunt placito babito de Terris Ecclesia de Heli, antequam mea conjux in Normaniam no-wissime weniret, cum quibus etiam sint de Barenibus meis, qui competenter adesse poterint & H 2

prædicto placito interfuerint & qui terras ejusdem Ecclesiæ tenent; Quibus in unum congregatis eligantur plures de illis Anglis qui sciunt quomodo Terræ jacebant præfatæ Ecclesiæ Die qua Rex Edwardus Obiit, & quod inde dixerint ibidem jure jurando testentur; quo facto restituentur Ecclesiæ terræ quæ in Dominico suo erant die obitus Regis Edwardi; Exceptus his quas homines, clamabant me sibi dedisse; illas vero Literis mihi significate que sint, & qui eas tenent; Qui autem tenent Theinlandes quæ proculdubio debent teneri de Ecclesia faciant concordiam cum Abbate quam Meliorem poterint, & st noluerunt terræ remaneant ad Ecclesiam, Hoc quoque detinentibus

Socham & Saccam fiat, &c.

Willielmus Rex Anglorum, Lanfranco Archiepisc', & G. Episc. & R. Comiti M. Salutem, &c. Defendite ne Remigius Episcopus novas consuetudines requirat infra Insulam de Heli, Nolo enim quod ibi babeat nisi illud quod Antecessor ejus habebat Tempore Regis Edwardi Scilicet qua die ipse Rex mortuus est. Et si Remig. Episcopus inde Placitare voluerit placitet inde ficut fecisset tempore Regis Edw. & placitum istum sit in vestra præsentia; De custodia de Norquic Abbatem Simeonem quietum esse demittite; Sed ibi municionem suam conduci faciat & custodiri. Facite remanere placitum de Terris quas Calumniantur Willielmus de on, & Radulphus filius Gualeranni, & Robertus Gernon; si inde placitare noluerint scut inde placitassent tempore Regis Edwardi, & sicut in eodem tempore Abbatia consuetudines suas babebat, Volo ut eas omnino faciatis habere sicut Abbas per Char-

tas

tas suas, & per Testes suos eas deplacitare poterit.

I might add many more Charters to the Ecclesiaforegoing, and more especially those fa- stical Jumous Charters in Spelman's Councils, Vol. 2. rifdiction Fol. 14. 6 165. whereby it appears, That from the King William I. Communi Concilio, & Concilio Temporal Archiepiscoporum, Episcoporum & Abbatum, & omnium Principum & Baronum Regni, instituted the Courts for holding Pleas of Ecclefiaftick Causes, to be separate and distinct from those Courts that had Jurisdiction of Civil Causes. Sed de his plusquam satis.

And thus I conclude the Point I first propounded, viz. How King William I. after his Victory, dealt with the Possessions of the English, whereby it appears that there was no Pretence of an Universal Conquest, or that he was a Victor in Populum; neither did he claim the Title of English Lands upon that Account, but only made use of his Victory thus far, to seize the Lands of such as had oppos'd him: Which is universal in all Cases of Victories, tho' without the Pretence of Conquest.

Secondly, Therefore I come to the Second ad Quegeneral Question, viz. What was done in stion. relation to the Laws? It is very plain, that the King, after his Victory, did, as all wife Princes would have done, endeavour to make a stricter Union between England and Normandy; and in order thereunto, he endeavoured to bring in the French instead of the Saxon Language, then used in England: De-H 4

liberavit

103

Endeavoured a Union, in the Language and Laws of England and Normandy.

liberavit (says Holcot) quomodo Linguam Saxoni-William I. cam possit destruere, & Anglicam & Normanicam idiomate concordare & ideo ordinavit quod nullus in Curia Regis placitaret nisi in Lingua Gallica, &c. From whence arose the Practice of Pleading in our Courts of Law in the Norman or French Tongue, which Custom continued till the Statute of 36 E. 3. c. 15.

And as he thus endeavoured to make a Community in their Language, so possibly he might endeavour to make the like in their Laws, and to introduce the Norman Laws into England, or as many of 'em as he thought convenient; and it is very probable, that after the Victory, the Norman Nobility and Soldiers were scattered through the whole Kingdom, and mingled with the English, which might possibly introduce some of the Norman Laws and Customs infensibly into this Kingdom; and to that End, the Conqueror did industriously mingle the English and Normans together, shuffling the Normans into English Possessions here, and putting the English into Possessions in Normandy, and making Marriages among them, especially between the Nobility of both Nations.

This gave the English a Suspicion, that they should suddenly have a Change of their Laws before they were aware of it. But it fell out much better: For first, there arising fome Danger of a Defection of the English, countenanced by the Archbishop of York in the North, and Frederick, Abbot of St. Albans in the South; the King, by the Perswasions of Lanfrank, Archbishop of Canterbury, Pro bona

pacis

pacis apud Berkhamstead juravit super Animas reliquias Sancti Albani tactisque Sacrosanctis The Evangeliis (ministrante juramento Abbate Frede- English rico) ut bonas & approbatas antiquas Regni Leges Laws quas sancti & pii Angliæ Reges ejus Antecessores, ed. & maxime Rex Edvardus statuit inviolabiliter observaret; Et sic pacificati ad propria læti recesserunt. Vide Mat. Paris in Vita Frederici Abbatis Sancti Albani.

But altho' now, upon this Capitulation, the ancient English Laws were confirm'd. and namely, the Laws of St. Edward the Confessor; yet it appeared not what those Laws were: And therefore, in the Fourth Year of his Reign, we are told by Hoveden, in a Digression he makes in his History under the Reign of King Hen. II. and also

in the Chronicle of Litchfield.

Willielmus Rex, Anno quarto Regnisui Consilio Baronum suorum fecit Summonari per Universos Consulatos Anglia, Anglos Nobiles & Sapientes & sua Lege eruditos ut eorum jura & consuetudines ab ipsis audiret, Electis igitur de singulis totius Patriæ Comitatibus viri duodecim, jurejurando confirmaverunt ut quoad possint recto tramite neque ad Dextram neque ad Sinistram partem divertentes Legum suarum consuetudinem & sancitam patefacerent nibil prætermittentes nibil addentes, nibil prævaricando mutantes, &c. And then fets down many of those ancient Laws approv'd and confirm'd by the King, and Commune Concilium; wherein it appears, that he seems to be most pleased with those Laws that came under the Title of Lex Danica, as most consonant to the Norman Customs, 105

Quo auditu mox universi compatrioti qui Leges dixerint Tristes effecti, uno ministerio deprecati sunt quatenus permitteret Leges sibi proprias & consuetudines antiquas babere in quibus vixerunt Patres, & ipsi in iis nati & nutriti sunt, quia durum Valde sibi foret suscipere Leges ignotas, & judicare de iis quæ nesciebant; Rege vero ad flectendum ingrato existente, tandem eum persecuti sunt deprecantes quatenus pro Anima Regis Edvardi qui eas sub diem suum eis concesserat Barones & Regnum & cujus orant Leges non aliorum extraneorum cogere quam sub Legibus perseverare patriz; Unde Consilio habito Pracatui Baronum tandem acquievit, &c.

Gervasius Tilburiensis, who lived nearer that Time, speaks shortly, and to the Purpose, thus: Propositis Legibus Anglicanis secundum triplicitam earum Distinctionem, i. e. Merchenlage, Westsaxon-lage, & Dane-lage quasdam earum reprobans quasdam autem approbans, illis transmarinas Leges Neustriæ quas ad Regni Pacem tuendam efficacissime videbantur,

adjecit.

So that by this, there appears to have been a double Collection of Laws, viz.

First, The Laws of the Confessor, which were granted and confirmed by King William, and are also called the Laws of King William, which are transcribed in Mr. Selden's Notes upon Eadmerus, Page 173. the Title whereof is thus, viz. Ha sunt Leges & Consuetudines quas Willielmus Rex concessit universo populo Anglia post subactam Terram eadem sunt quas Edvardus Rex cognatus ejus observavit ante eum: And these seem to be the

feffor's Laws Confirmed.

The Con-

very

http://www.hathitrust.org/access use#pd

Generated on 2023-03-20 Public Domain / http:/

107

very fame that Ingulfus mentions to have been brought from London, and placed by him in the Abbey of Crowland in the Fifteenth Year of the same King William, attuli eadem Vice mecum Londini in meum Monasterium Legum

Volumen, &c.

Secondly, There were certain additional And Laws at time establish'd, which Gervasius others Tilburiensis calls, Leges Neustriæ quæ efficacissimæ added. videbantur ad tuendam Regni pacem; which feems to be included in those other Laws of King William transcribed in the same Notes upon Eadmerus, Page 189, 193, &c. which indeed were principally defigned for the Establishment of King William in the Throne, and for the fecuring of the Peace of the Kingdom, especially between the English and Normans, as appears by these Instances, viz.

The Law de Murdro, or the Common Fine for a Norman or Frenchman flain, and the Offender not discovered: The Law for the Oath of Allegiance to the King: The Introduction of the Trial by fingle Combat, which many Learned Men have thought was not in Use herein England before William I. And the Law touching Knights Service, which Bracton, Lib. 2. Supposes to be introduced by the Conqueror, viz. Quod omnes Comites Milites & Servientes & universit liberi homines totius Regni habeant & teneant se semper bene in Armis & in Equis ut decet & quod sint semper prompti & bene parati ad Servitium suum integrum nobis explendum & peragendum cum semper Opus affuerit secundum quod nobis de Feodo debent & Tenementis suis de Jure fa-

Digitized by UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

cere & sicut illis statuimus per Commune Concilium totius Regni nostri prædicti, & illis dedimus & concessimus in Feodo jure hæreditario. Wherein we may observe, that this Constitution seems to point at Two Things, viz. The affizing of Men for Arms, which was frequent under the Title De assidenda ad Arma, and is afterwards particularly enforc'd and rectified by the Statute of Winton, 13 E. 1. and next of Conventional Services reserved by Tenures upon Grants made out of the Crown or Knights Service, called in Latin, Forinsecum, or Regale Servitium.

And Note, That these Laws were not imposed ad Libitum Regis, but they were such as were settled per Commune Concilium Regni, and possibly at that very Time when Twelve out of every Courty were return'd to ascertain the Confessor's Laws, as before is mentioned out of Hoveden, which appears to be as sufficient and effectual a Parliament as

ever was held in England.

By all which it is apparent, First, That William I. did not pretend, nor indeed could he pretend, notwithstanding this Nominal Conquest, to alter the Laws of this Kingdom without common Consent in Communi Concilio Regni, or in Parliament. And, Secondly, That if there could be any Pretence of any such Right, or if in that turbulent Time something of that Kind had happened; yet by all those solemn Capitulations, Oaths, and Concessions, that Pretence was wholly avoided, and the ancient Laws of the Kingdom settled, and were not to be altered, or added

added unto, at the Pleasure of the Conqueror, without Consent in Parliament.

In the Seventeenth Year of his Reign. (or as some say, the Fifteenth) he began that great Survey, recorded in Two Books, called, The Great Doomsday Book, and Little Doomsday Book, and finished it in the Twentieth Year of his Reign, Anno Domini 1086. as appears by the learned Preface of Mr. Selden to Eadmerus, and indeed by the Books themselves. The Original Record of which is still extant, remaining in the Custody of the Vice-Chamberlains of Her Majesties Ex-This Record contains a Survey of all the ancient Demeain Lands of the Kingdom, and contains in many Manors, not only the Tenants Names, with the Quantity of Lands and their Values, but likewise the Number and Quality of the Resients or Inhabitants, with divers Rights, Privileges, and Customs claimed by them; and being made and found by Verdict or Presentment of Juries in every Hundred or Division upon their Oaths, there was no Receeding from, or Avoiding what was written in this Record: And therefore as Gervasius Tilburiensis lays, Page 41. Ob hoc nos eundem Librum Judiciarium Nominamus; Non quod in eo de propositis aliquibus dubius feratur sententia, sed quod ab eo sicut ab ultimo Die fudicii non licet ulla ratione discedere.

And thus much shall suffice touching the Fifth General Head; namely, of the Progress made after the Coming in of King William,

William, relating to the Laws of England, their Establishment, Settlement, and Alteration. If any one be minded to fee what this Prince did in reference to Ecclesiasticks, let him confult Eadmerus, and the Learned Notes of Mr. Selden upon it, especially Page 167, 168, &c. where he shall find how this King divided the Episcopal Consistory from the County Court, and how he reftrain'd the Clergy and their Courts from exercising Ecclefiastical Jurisdiction upon Tenants in Capite.

CHAP.

## CHAP. VI.

Concerning the Parity or Similitude of the Laws of England and Normandy, and the Reasons thereof.

THE great Similitude that in many Our Laws Things appears between the Laws of not deri-England, and those of Normandy, has given the Nersome Occasion to such as consider not well mans. of Things, to suppose that this happened by the Power of the Conqueror, in Conforming the Laws of this Kingdom to those of Normandy; and therefore will needs have it, that our English Laws still retain the Mark of that Conquest, and that we received our Laws from him as from a Conqueror; than which Affertion, (as it appears even by what has before been faid) nothing can be more untrue. Besides, if there were any Laws derived from the Normans to us, as perhaps there might be some, yea, possibly many; yet it no more concludes the Position to be true, that we received such Laws per Modum Conquestus, than if the Kingdom of England should at this Day take some of the Laws of Persia, Spain, Egypt, or Assyria, and by Authority of Parliament settle them here. Which tho' they were for their Matter Foreign, yet their obligatory Power, and their formal Nature

or Reason of becoming Laws here, were not at all due to those Countries, whose Laws they were, but to the proper and intrinsical Authority of this Kingdom by which they were received as, or enacted into, Laws: And therefore, as no Law that is Foreign binds here in England, till it be received and authoritatively engrafted into the Law of England; so there is no Reason in common Prudence and Understanding for any Man to conclude, that no Rule or Method of Justice is to be admitted in a Kingdom tho' never fo Useful or Beneficial. barely upon this account, That another People entertain'd it, and made it a Part of their Laws before us.

But as to the Matter it felf I shall confider, and enquire of the following Par-

ticulars, viz.

1. How long the Kingdom of England and Dutchy of Normandy stood in Conjunation under one Governor.

2. What Evidence we have touching the Laws of Normandy, and of their Agreement

with ours.

E's

3. Wherein confifts that Parity or Dif-

parity of the English and Norman Laws.

4. What might be reasonably judged to be the Reason and Foundation of that Likeness, which is to be found between the Laws of both Countries.

First, Touching the Conjunction under one Governor of England and Normandy, we are

are to know, That the Kingdom of England and Dutchy of Normandy were de facto in Conjunction under these Kings, viż. William I. William II. Henry I. King Stephen, Henry II. and Richard I. who, dying without Issue, left behind him Arthur Earl of Britain, his Nephew, only Son of Geoffry Earl of Britain, second Brother of Richard I. and John the youngest Brother to Richard I. who afterward became King of England by wsurping the Crown from his Nephew Arthur. But the Princes of Normandy still adhered to Arthur, sicut Domino Ligeo suo dicentes Judicium & Consuetudinem esse illarum Regionum ut Arthurus Filius Fratris Senirois in Patrimonio sibi debito & bæreditate Avunculo suo succedat eodem jure quod Gaulfridus Pater ejus effet habiturus si Regi Richardo defuncto supervixisset.

And therein they faid true, and the Laws Elder of England were the same, Witness the Suc- Brother cession of Richard II. to Edward III. also Life of the Laws of Germany, and the ancient Saxons the Fawere accordant hereunto; and it was ac- ther, his cordingly decided in a Trial by Battle, un- Son to der Otho the Emperor, as we are told by inherit. Radulphas, de Diceto sub Anno 945. And such are the Laws of France to this Day, Vide Chopimus de Domanio Franciæ, Lib. 2. Tit. 12. And such were the ancient Customs of the Normans, as we are told by the Grand Contumier, cap. 99. And such is the Law of Normandy, and of the Isles of Fersey and Guernsey (which some time were Parcel thereof) at this Day, as is agreed by Terrier, the best Expositor of their Customs, Lib. 2.

cap.

UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

http://www.hathitrust.org/access\_use#pd

GMT

Generated on 2023-03-20 Public Domain / http:/

cap. 2. And so it was adjudg'd within my Remembrance in the Isle of Fersey, in a Controversie there, between John Perchard and Fohn Rowland, for the Goods and Estate of Peter Perchard.

But nevertheless, John the Uncle of Arthur came by Force and Power, Et Rotomagum Gladio Ducatus Normanniæ accintus est per Ministerium Rotomagensis Archiepiscopi, as Mat. Paris fays; and shortly after also usurped the Crown of England, and imprisoned his Nephew Arthur, who died in the Year 1202. being as was supposed Murthered by his faid Uncle, Vide Mat. Paris in fine Regni Regis Rici' Primi, and Walfingham in his Ypodigma Neustriæ sub eodem Anno 1202.

And to countenance his Ulurpation in Normandy, and to give himself the better Pretence of Title, he by his Power so far prevailed there, that he obtained a change of the Law there, purely to serve his Turn, by transferring the Right of Inheritance from the Son of the elder Brother to the younger Brother, as appears by the Grand Contumier, cap. 99. But withal, the Gloss takes notice of it as an Innovation, and brought in by Men of Power, tho' it mentions not the particular Reason, which was as aforesaid.

The King of France (of whom the Dutchy of Normandy was holden) highly refented the Injury done by King John to his Nephew Arthur, who as was strongly suspected came not fairly to his End. He fummoned King John as Duke of Normandy into France, to give an Account of his Actions, and upon

his

his Default of appearing, he was by King Philip of France forejudged of the faid Duchy, Vide Mat. Paris, in initio Regni Johannis; and this Sentence was so effectually put in Execution, that in the Year 1204. Mat. Paris tells us, Tota Normannia, Turania Andegavia, & Pictavia cum Civitatibus & Castellis & Rebus aliis præter Rupellam, Toar, & Mar Castellam sunt in Regis Francorum Dominium devoluta.

But yet he retained, tho' with much Difficulty, the Islands of Jersey and Guernsey, and the uninterrupted Possession of some Parts of Normandy for some time after, and both he and his Son King Hen. III. kept the Stile and Title of Dukes of Normandy, &c. till the 43d Year of King Hen. III. at which time for 3000 Livres Tournois, and Normandy upon some other Agreements, he resigned resigned Normandy and Anjou to the King of France, and never afterwards used that Title, as appears by the Continuation of Mat. Paris, fub Anno 1260. only the four Islands, some time Parcel of Normandy, were still, and to this Day, are enjoyed by the Crown of England, viz. Fersey, Guernsey, Sarke, and Aldernay, tho' they are still governed under their ancient Norman Laws.

Secondly, As to the Second Inquiry, What Evidence we have touching the Laws of Normandy: The best, and indeed only common Evidence of the ancient Cultoms and Laws, of Normandy, is that Book which is called, The Grand Contumier of Normandy, which in later Years has been illustrated,

by King

115

The Con, Normandy not only with a Latin and French Gloss, but also with the Commentaries of Terrier, a French Author.

This Book does not only contain many of the ancienter Laws of Normandy, but most plainly it contains those Laws and Customs which were in Use here in the Time of King Hen. II. King Rich. I. and King John, yea, and fuch also as were in Use and Pra-Etice in that Country after the Separation of Normandy from the Crown of England; for we shall find therein, in their Writs and Processes, frequent Mention of King Rich. I. and the entire Text of the 110th Chapter thereof is an Edict of Philip King of France, after the Severance of Normandy from the Crown of England. (I speak not of those additional Edicts which are annex'd to that Book of a far later Date.) So that we are not to take that Book as a Collection of the Laws of Normandy, as they stood before the Accession or Union thereof to the Crown of England; but as they stood long after, under the Time of those Dukes of Normandy that succeeded William I. and it seems to be a Collection made after the Time of K. Hen. III. or at least after the Time of K. John, and consequently it states their Laws and Customs as they stood in Use and Pra-Rice about the Time of that Collection made, which Observation will be of Use in the ensuing Discourse.

Thirdly, Touching the Third Particular, viz The Agreement and Disparity of the Laws of England and Normandy. It is very

true,

3.

true, we shall find a great Suitableness in their Laws, in many Things agreeing with the Laws of England, especially as they stood in the Time of King Hen. II. the best Indication whereof we have in the Collection of Glanville; the Rules of Descents, of Writs, of Process, of Trials, and some other Particulars, holding a great Analogy in both Dominions, yet not without their Differences and Disparities in many Particulars, viz.

First, Some of those Laws are such as were never used in England; for Instance, There Diffewas in Normandy a certain Tribute paid to rence bethe Duke, called Monya, id eft, a certain tween the Sum yielded to him (in Consideration that and the he should not alter their Coin) payable eve- Laws of ry three Years, Vide Contumier, cap. 15. But England. this Payment was never admitted in England; indeed it was taken for a Time, but was ousted by the first Law of King Hen. I. as an Usurpation. Again, by the Custom of Normandy, the Lands descended to the Bastard Eigne, born before Marriage of the fame Woman, by whom the fame Man had other Children after Marriage, Contumier, cap. 27. But the Laws of England were always contrary, as appears by Glanville, Lib. 7°. cap. 12. And the Statute of Merton, which lays, Nolumus Leges Anglicanas Mutare, &c. Again, by the Laws of Normandy, if a Man died without Issue, or Brother, or Sister, the Lands did descend to the Father, Contumier, cap. 15. Terrier, cap. 2. But in Eng-I

http://www.hathitrust.org/access

GMT

Generated on 2023-03-20 Public Domain / http:/

England, this Law seems never to have been used, Sed Quære, Glanville, Lib. 7. cap. I. adly, Again, Some Laws were used in Normandy, which were in Use in England long before the supposed Norman Conquest, and therefore could in no Poffibility have their original Force, or any binding Power here upon that Pretence: For Instance, it appears by the Custumier of Normandy, that the Sheriff of the County was an Annual Officer, and so 'tis evident he was likewise in England before the Conquest: And among the Laws of Edward the Confessor, it is provided, Quod Aldermanni in Civitatibus eandem habeant Dignitatem qualem habent Ballivi hundredorum in Ballivis suis sub Vicecomitem: Again, Wreck of the Sea, and Treasure Trove was a Prerogative belonging to the Dukes of Normandy, as appears by the Contumier, cap. 17, & 18. and so it was belonging to the Crown of England before the Conquest, as appears by the Charter of Edward the Confessor to the Abby of Ramsey of the Manor of Ringstede, cum toto ejectu Maris quod Wreccum dicitur, and the like, vide ibid. of Treasure Trove, & vide the Laws of Edward the Confessor, cap. 14. So Fealty, Homage, and Relief, were incident to Tenures by the Laws of Normandy, Vide Contumier, cap. 29. And so they were in England before the Conquest, as appears by the Laws of Edward the Confessor, cap. 35. and the Laws of Canutus, mentioned by Brompton, cap. 8. So the Trial by Jury of Twelve Men

was the usual Trial among the Normans in

most

most Suits, especially in Assizes, & Juris Utrums, as appears by the Contumier, cap. 92, 93, & 94. and that Trial was in Use here in England before the Conquest, as appears in Brompton among the Laws of King Etheldred, cap. 3. which gives some Specimen of it, viz. Habeant placita in singulis Wapentachiis & exeant Seniores duodecim Thani vel Prapositus cum iis & jurent quod neminem innocentem accusare nec Noxium concelare.

3dly, Again, In some Things, tho' both the Law of Normandy and the Law of England agreed in the Fact, and in the manner of Proceeding; yet there was an apparent Discrimination in their Law from ours: As for Instance, The Husband seized in Right of the Wife, having Issue by her, and she dying, by the Custom of Normandy he held but only during his Widowhood, Contumier, cap. 119. But in England, he held during his Life by the Curtesy of

England.

4thly. But in fome Things, the Laws of Normandy agreed with the Laws of England, especially as they stood in the Times of Hen. II. and Richard I. so that they seem to be as it were Copies or Counterparts one of another; tho' in many Things, the Laws of England are since changed in a great Measure from what they then were: For Instance, at this Day in England, and for very many Ages past, all Lands of Inheritance, as well Socage Tenures, as of Knights Service, descend to the eldest Son, unless in Kent and some other Places where the

Custom directs the Descent to all the Males, and in some Places to the youngest; but the ancient Law used in England, thoughit directed Knights Services and Serjeanties to descend to the eldest Son, yet it directed Vasfalagies and Socage Lands to descend to all the Sons, Glanvil, Lib. 7. cap. 3. and to does the Laws of Normandy to this Day. Vide Contumier, cap 26. & post bic, cap. 11.

Again, Leprofy at this Day does not impede the Descent; but by the Laws in Use in England, in the elder Times, unto the Time of King John, and for some Time afterwards, Leprofy did impede the Descent, as Placito quarto Johannis, in the Cale of W. Fulch, a Judge of that Time; and accordingly were the Laws of Normandy,

Vide Le Contumier, cap. 27.

Old Law by Jury.

Again, At this Day, by the Law of Engof Trials land, in Cases of Trials by Twelve Men, all ought to agree, and any one diffenting, no Verdict can be given; but by the Laws of Normandy, though a Verdict ought to be by the concurring Consent of Twelve Men. yet in case of Dissent or Disagreement of the Jury, they used to put off the lesser Number that were Diffenters, and added a kind of Tales equal to the greater Number fo agreeing, until they had got a Verdict of . Twelve Men that concurred, Contumier, c. 95. And we may find some ancient Footsteps of the like Use here in England, though long since antiquated, Vide Bracton, Lib. 4. cap. 19. where he speaks thus, Contingit etiam multotiens quod Juratores in veritate dicenda sunt

# Ch. 6. Common Law of England.

IZI

sibi contrarii ita quod in unam concordare non possunt sententiam, Quo casu de Consilio Curiæ affortietur Assisa, ita quod apponantur alii juxta numerum majoris partis quæ dissenserit, vel saltem quatuor vel sex & adjungantur aliis, vel etiam per seipsos sine aliis, de veritate discutiant & judicent, & per se respondeant & eorum veredictum allocabitur & tenebitur cum quibus ipsi convenirent.

Again, at this Day, by the Laws of England, a Man may give his Lands in Fee- Descents. simple, which he has by Descent, to any one of his Children, and disinherit the rest: But by the ancient Laws used here, it seems to be otherwise; as Mich. 10 Johannis Glanv. Lib. 7. cap. 2. the Case of William de Causeia. And accordingly were the Laws of Normandy, as we find in the Grand Contumier, cap. 36. Quand le Pere avoit plusieurs fills, ils ne peut faire de son Heritage le un Meilleur que le auter; and yet it seems to this Day, in England, it holds some Resemblance in Cases of Frank-Marriage, viz. That the Doness, in case she will have any Part of her Father's other Lands, ought to put her Lands in Hochpot.

Again, By the Law of England, the younger Brother shall not exclude the Son of the elder, who died in the Life-time of the Father: And this was the ancient Law of Normandy, but received fome Interruption in Favour of King John's Claim, Vide Contumier, cap. 25. & bic ante; and indeed, generally the Rule of Descents in Normandy was the same in most Cases with that of Difcents

Discents with us at this Day; as for Inftance, That the Descent of the Line of the Father shall not resort to that of the Mother, Et e converso; and that the Course was otherwise in Cases of Purchases. But in most Things the Law of Normandy was consonant to the Law with us, as it was in the Time of King Richard I. and King John; except in Cases of Descents to Bastard eigne, excluding Mulier puisne, as aforefaid.

Their Writs.

Again, at this Day there are many Writs now in Use which were anciently also in Use here, as well as in Normandy: As Writs, of Right, Writs of Dower, Writs De novel Disseisin, de Mortdancestor, Juris utrum, Darrein presentment, &c. And some that are now out of Use, though anciently in Use here in England; as Writs De Feodo vel vado, De Feodo vel Warda, &c. All which are taken Notice of by Glanvil, Lib. 13. cap. 28, 29. And the very same Forms of Writs in Effect were in Use in Normandy, as appears by the Contumier per Totum, and the Writ De Feodo vel Vado, (ibid. cap. 11.) according to Glanville, Lib. 13. cap. 27. runs thus, viz. Rex Vicecomiti salutem: Summone per bonos summonitores duodecim liberos & legales homines de vicineto quod fint coram me vel Justiciis meis eo die parati Sacramento Recognoscere utrum N. teneat unam Carucatam Terræ in illa villa quæ R. clamat versus eum per Breve meum in Feodo an in vadio, invadiatam ei ab ipso R. vel ab H. anteceffore ejus, (vel aliter) fi fit Feodam vel bæreditas ipsius N. an in vadio invadiata ei ab ipso R. vel

#### Ch. 6. Common Law of England.

R. vel ab H. &c. Et interim Terram illam videant, &c. Vide ibid.

And according to the Grand Contumier, that Writ runs thus, viz. Si Rex fecerit te securum de clamore suo prosequend' summoneas Recognitores de Viceneto quod sint ad primas Assisas Ballivæ, ad cognoscendum utrum Carucata Terræ in B. quod G. deforceat R. sit Feodum tenentis vel vadium novum dietum per Manus G. post Coronationem Regis Richardi & pro quanta, & utrum sit propinquior Hæres ad redimendum vadium, & videatur interim Terræ, &c. So that there seems little Variance, either in the Nature or in the Form of those Writs used here, in the Time of Henry II. And those used in Normandy when the Contumier was made.

Again, The Use was in England to limit Times of certain notable Times, within the Compass Limitaof which those Titles which Men defign'd to be relieved upon, must accrue: Thus it was done in the Time of Henry III. by the Statute of Merton, cap. 8. at which Time the Limitation in a Writ of Right was from the Time of King Henry I. and by that Statute it is reduced to the Time of King Henry II. and for Affizes of Mortdancestor they were thereby reduced from the last Return of King John out of Ireland, which was 12 Fohannis, and for Affizes of Novel Difseisin, a prima Transfretatione Regis in Normanniam, which was & Hen. 3. and which before that had been post ultimum redditum Henricus III. de Britannia, as appears by Bracton. And this Time of Limitation was allo

123

also afterwards, by the Statute of West. 1. cap. 39. and West. 2. cap. 2. 46. reduced unto a narrower Scantlet, the Writ of Right being limited to the First Coronation of

King Richard L.

But before the Limitation let by that Statute of Merton, there were several Limitations set for several Writs; for we find among the Pleas of King John's Time, the Limitation of Writs, De Tempore quo Rex Henricus avus noster fuit vivus & Mortuus; and in a Writ of Aile, Die quo Rex Henricus obiit in the Time of Henry II. as appears by Glanville, Lib. 12. cap. 3. there were then divers Limitations in Ule, as in Mortdancestors, post prima Coronationem nostram, viz. Henrici secundi, Glanvil. Lib. 1. cap. 1. and touching Affizes of Novel Difseisin, Vide ibid. cap. 32. where he tells us, Cum quis intra Assisam, &c. And the Time of Limitation in an Assize, was then post ultimam meam Transfretationem, (viz. Henrici primi) in Normanniam, Lib. 13. cap. 33. But in a Writ of Right, as also in a Writ of Customs and Services, it was de tempore Regis Henrici avi mei, viz. Hen. 1. vid. ib. Lib. 12. cap. 10, 16. And it feems very apparent, that the Limitations anciently in Normandy, for all Actions Ancestrel was post primam Coronationem Regis Henrici secundi, as appears expresly in the Contumier, cap. 111. De Feofe & Gage.

So that aneiently the Time of Limitation in Normandy was the same as in England, and indeed borrowed from England, viz. In all Actions Ancestrel from the Coronation

Digitized by
UNIVERSITY OF ILLINOIS AT
URBANA-CHAMPAIGN

of

# Ch. 6. Common Law of England.

of Henry II. And thus in those Actions wherein the Limitation was anciently from the Coronation of King Richard I. was substituted as in the Writ De Feofe & Gage, in the Contumier, cap. III. De Feofe & Forme, cap. 112. In the Writ De Ley Apparisan, ib. cap. 24. & cap. 22. Ascun Gage ne peut estre requise en Normandy, si il ne fuit engage post le Coronement de Roy Richard ou deins quarante annus: So that the old Limitation, as well for the Redemption of Mortgages, as for bringing those Writs above-mentioned, was post Coronationem Regis Henrici Secundi; but altered, as it feems, by King Philip, the Son of Lewis King of France, after King Fobn's Ejectment out of Normandy, and fince the Time from the Coronation of King Richard I. is estimated to bear Proportion to 40 Years. It is probable this Change of the Limitation by King Philip of France, was about the beginning of the Reign of King Henry III. or about 30 or 40 Years after the Coronation of Richard I. from whose Coronation about 30 Years were elapsed, 5 aut 6 Henrici 3. for anciently the Limitation in this Case was 30 Years.

Fourthly, I now come to the Fourth Inquiry, viz. How this great Parity between the Laws of England and Normandy came to be effected; and before I come to it, I shall premise Two Observables, which I would have the Reader to carry along with him through the whole Discourse, viz. First, That this Parity of Laws does not at all infer a Necessity, that they should be imposed

125

imposed by the Conqueror, which is sufficiently shewn in the foregoing Chapters; and in this it will appear, that there were divers other Means that caused a Similitude of both Laws, without any Supposition of imposing them by the Conqueror. Secondly, That the Laws of Normandy were in the greater Part thereof borrowed from ours, rather than ours from them, and the Similitude of the Laws of both Countries did in greater Measure arise from their Imitation of our Laws, rather than from our Imitation of theirs, though there can't be denied a Reciprocal Imitation of each others Laws was, in some Measure at least, had in both Dominions: And these Two Things being premised, I descend to the Means whereby this Parity or Similitude of the Laws of both Countries did arise, as follow, viz.

Causes of ty of Laws.

First, Mr. Camden and some others have a congrui- thought, there was ever some Congruity between the ancient Customs of this Island and those of the Country of France, both in Matters Religious and Civil; and tells us of the ancient Druids, who were the common Instructors of both Countries. Gallia Causidicos docuit facunda Britannos: And some have thought, that anciently both Countries were conjoined by a small Neck of Land, which might make an easier Transition of the Customs of either Country to the other; but those Things are too remote Conjectures, and we need them not

#### Ch. 6. Common Law of England.

to folve the Congruity of Laws between England and Normandy. Therefore,

Secondly, It feems plain, that before the Com-Normans coming in Way of Hostility, there merce, &c. was a great Intercourse of Commerce and the English Trade, and a mutual Communication, be- and Nortween those Two Countries; and the Con-mans. fanguinty between the Two Princes gave Opportunities of feveral Interviews between them and their Courts in each others Countries: And it is evident by Hiftory, that the Confessor, before his Accession to the Crown, made a long Stay in Normandy, and was there often, which of Confequence must draw many of the English thither, and of the Normans hither; all which might be a Means of their mutual Understanding of the Customs and Laws of each others Country, and gave Opportunities of incorporating and engrafting divers of them into each other, as they were found useful or convenient; and therefore the Author of the Prologue to the Grand Custumier thinks it more probable, That the Laws of Normandy were derived from England, than that ours were derived from thence.

Thirdly, 'Tisevident, that when the Duke of Normandy came in, he brought over a great Multitude, not only of ordinary Soldiers, but of the best of the Nobility and Gentry of Normandy; hither they brought their Families, Language and Customs, and the Victor used all Art and Industry to incorporate them into this Kingdom: And the more effectually to make both People

127

become

become one Nation, he made Marriages between the English and Normans, transplantmaingny Norman Families hither, and many English Families thither; he kept his Court fometimes here, and fometimes there; and by those Means infensibly derived many Norman Customs hither, and English Customs thither, without any fevere Imposition of Laws on the English as Conqueror: And by this Method he might eafily prevail to bring in, even without the People's Consent, some Customs and Laws that perhaps were of Foreign Growth; which might the more eafily be done, confidering how in a short Time the People of both Nations were intermingled; they were mingled in Marriages, in Families, in the Church, in the State, in the Court, and in Councils; yea, and in Parliaments in both Dominions, though Normandy became, as it were, an Appendix to England, which was the nobler Dominion, and received a greater Conformity of their Laws to the English, than they gave to it.

Fourthly, But the greatest Means of the Assimilation of the Laws of both Kingdoms was this: The Kings of England continued Dukes of Normandy till King John's Time, and he kept some Footing there notwithstanding the Confiscation thereof by the King of France, as aforesaid; and during all this Time, England, which was an absolute Monarchy, had the Prelation or Preference before Normandy, which was but a Feudal Dutchy, and a small Thing in respect of England;

7

# Generated on 2023-03-20 16:46 GMT / https://hdl.handle.net/2027/uiuc Public Domain / http://www.hathitrust.org/access\_use#pd

# Ch. 6. Common Law of England.

England; and by this Means Normandy became, as it were, an Appendant to England, and fucceffively received its Laws and Government from England; which had a greater Influence on Normandy than that could have on England; infomuch, that oftentimes there issued Precepts into Normandy to summon Persons there to answer in Civil Causes here; yea, even for Lands and Possessions in Normandy; as Placito 1 Johannis, a Precept issued to the Seneschal of Normandy, to summon Robert Feronymus, to answer to John Marshal, in a Plea of Land, giving him 40 Days Warning; to which the Tenant appeared, and pleaded a Recovery in Normandy: And the like Precept issued for William de Bosco, against Jeoffry Rusham, for

And on the other Side, Trin. 14 Johannis, in a Suit between Francis Borne and Thomas Adorne, for certain Lands in Ford. The Defendant pleaded a Concord made in Normandy in the Time of King Richard I. upon a Suit there before the King, for the Honour of Bonn in Normandy, and for certain Lands in England; whereof the Lands in Question were Parcel before the Seneschal of Normandy, Anno 1099. But it was excepted against, as an insufficient Fine, and varying in Form from other Fines; and therefore the Defendant relied upon it as a Release.

Lands in Corbespine in Normandy.

By these, and many the like Instances, it appears as follows, viz.

K

FrA

129

First. That there was a great Intercourse between England and Normandy before and after the Conqueror, which might give a great Opportunity of an Assimilation and Conformity of the Laws in both Countries. Secondly, That a much greater Conformation of Laws arole after the Conqueror, during the Time that Normandy was enjoyed by the Crown of England, than before. And Thirdly, That this Similitude of the Laws of England and Normandy was not by Conformation of the Laws of England to those of Normandy, but by Conformation of the Laws of Normandy to those of England, which now grew to a great Height, Perfection and Glory; fo that Normandy became but a Perquifite or Appendant of it.

And as the Reason of the Thing speaks

First, It is apparent, That in Point of Limitation in Actions Ancestrel, from the Time of the Coronation of King Henry II. it was anciently so here in England in Glanwil's Time, and was transmitted from hence into Normandy; for it is no way reasonable to suppose the Contrary, since Glanville mentions it to be enacted here, Concilio procerum; and though this be but a single Point, or Instance, yet the Evidence thereof makes out a Criterion, or probable Indication, that many other Laws were in like Manner so sent the nece into Normandy.

Secondly,

ry I. whereof hereafter. So that it feems, by Use, Practice, Commerce, Study and Improvement of the English People, they arrived in Henry II.'s Time to a greater Improvement of the Laws; and that in the Time of King Richard I. and King John, they were more perfected, as may be feen in the Pleadings, especially of King John's Time; and tho far inferior to those of the Times of Succeeding Kings, yet they are far more regufar and perfect than, those that went before them. And now if any do but compare the Coutumier of Normandy, with the Tract of Glanville, he will plainly find that the Norman Tract of Laws followed the Pattern of Glanvil, and was writ long after it, when possibly the English Laws were yet more refined and more perfect; for it is plain beyond Contradiction, that the Collection of the Customs and Laws of Normandy was made after the Time of King Henry II. for it mentions his Coronation, and appoints it for the Limitation of Actions Ancestrel, which must at least be 30 Years after nay, the Contumier appears to have been

K 2

Original from UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

made

Digitized by
UNIVERSITY OF ILLINOIS AT
URBANA-CHAMPAIGN

http://www.hathitrust.org/access use#pd

GMT

16:46

Generated on 2023-03-20 Public Domain / http:/ made after the Act of Settlement of Normandy in the Crown of France; for therein is specified the Institution of Philip King of France, for appointing the Coronation of King Richard I. for the Limitation of Actions; which was after the faid Philip's

full Possession of Normandy.

Indeed, if those Laws and Customs of Normandy had been a Collection of the Laws they had had there before the coming in of King William I. it might have been a Probability that their Laws, being fo near like ours, might have been transplanted from thence hither; but the Case is visibly otherwise, for the Coutumier is a Collection after the Time of King Richard I. yea, after the Time of King John, and possibly after Henry III.'s Time, when it had received feveral Repairings, Amendments and Polishings, under the several Kings of England, William I. William II. Henry I. King Steven, Henry II. Richard I. and King John; who were either knowing themselves in the Laws of England, or were affifted with a Council that were knowing therein.

And as in this Tract of Time the Laws of England received a great Advance and Perfection, as appears by that excellent Collection of Glanville, written even in Henry II.'s Time, when yet there near 30 Years to acquire unto a further Improvement before Normandy was lost; so from the Laws of England thus modelled, polished and perfected, the same Draughts were drawn upon the Laws of

Normandy, which received the fairest Lines from the Laws of England, as they stood at least in the beginning of King John's Time, and were in Effect in a great Measure the Desloration of the English Laws, and a Transcript of them, though mingled and interlarded with many particular Laws and Customs of their own, which altered the Features of the Original in many Points.

Contract the First of Print of to so un

and the Relief of Albertages Land

bisinglon, of the had sed attended

K<sub>3</sub> CHAI

#### CHAP, VII.

Concerning the Progress of the Laws of England after the Time of King William I. until the Time of King Edward II. Count to Employ and Land MALA

HAT which precedes in the Two foregoing Chapters, gives us some Account of the Laws of England, as they stood in and after the great Change which happened under King William I. commonly called, The Conqueror. I shall now proceed to the History thereof in the ensuing Times, until the Reign of King Edward II.

K. W. 3.

William I. having Three Sons; Robert the eldest, William the next, and Henry the youngest, disposed of the Crown of England to William his second Son, and the Dutchy of Normandy to Robert his eldest Son; and accordingly William II. commonly called, William Rufus, succeeded his Father in this Kingdom. We have little memorable of him in relation to the Laws, only that he severely press'd and extended the Forest

K. H. T.

Henry L. Son of William L. and Brother of William II. succeeded his said Brother in the Kingdom of England, and afterwards expelled his eldest Brother Robert out of the Dutchy of Normandy also. He proceeded

# Ch. 7. Common Law of England.

135

pair'd the Laws.

ceeded much in the Benefit of the Laws, ではる。

First, He restored the Free-Election of Restored Bishops and Abbots, which before that Time and rehe and his Predecessors invested, per Annulum & Bacculum; yet referving those Three Enfigns of the Patronage thereof, viz. Conge d'Estire, Custody of the Temporalties, and Homage upon their Restitution. Vide Hove-

den, in Vita sua.

But Secondly, The great Esfay he made, was the composing an Abstract or Manual of Laws, wherein he confirm'd the Laws of Edward the Confessor, Cum illis Emendationibus quibus eam Pater meus emendavit Baronum fuorum Concilio; and then adds his own Laws, Iome whereof feem to taste of the Canon Law. The whole Collection is transcribed in the Red Book of the Exchequer; from whence it is now printed in the End of Lambard's Saxon Laws, and therefore not needful to be here repeated.

They, for the most Part, contain a Model of Proceedings in the County Courts, the Hundred Courts, and the Courts Leet: the former to be held Twelve Times in the Year, the latter twice; and also of the Courts Baron. These were the ordinary usual Courts, wherein Justice was then, and for a long Time after, most commonly administred; also they concern Criminal Proceedings, and the Punishment of Crimes, and some few Things touching Civil Actions and Interests, as in Chapter 70, directing Of De-Descents, viz.

scents.

Si

Ka

Si quis sine Liberis decesserit Pater aut Mater ejus in Hereditatem succedant, vel Frater vel Soron, si Pater & Mater desint; si nec hos habeat, Frater vel Soron Patris vel Matris, & deinceps in quintum Genetalium, qui cum propiotes in parentela sint hereditario fure succedant; Et dum virilis sexus extiterit & hæreditas ab inde sit Femina non hæreditetur; primum Patris Feodum primogenitus Filius habeat, Emptiones vero & deinceps Acquistiones det cui magis velit, sed si Bockland habeat quam ei Parentes dederint, non Mittat eam extra cognationem suam.

I have observ'd and inserted this Law. for Two Reasons, viz. First, To justify what I before faid, That the Laws of Normandy took the English Laws for their Pattern in many Things; Vide le Coutumier, cap. 25, 26, 26, &c. And Secondly, To fee how much the Laws of England grew and increased in their Particularity and Application between this Time and the Laws of William I. which in Chapter 36, has no more touching Descents but this, viz. Si quis intestatus obierit. liberi ejus hæreditatem equaliter dividant. But Process of Time grafted thereupon, and made particular Provisions for particular Cases, and added Distributions and Subdivisions to those General Rules.

These Laws of King Henry I. are a kind of Miscellany, made up of those ancient Laws, called, The Laws of the Confessor, and King William I. and of certain Parts of the Canon and Civil Law; and of other Provisions, that Custom and the Prudence

# Ch. 7. Common Law of England.

of the King and Council had thought upon, chosen, and put together.

137

King Stephen succeeded, by Way of Usur- King Stepation, upon Maud the Sole Daughter and phen. Heir of King Hen. I. The Laws of Hen. I. grew tedious and ungrateful to the People, partly because new, and so not so well known, and partly because more difficult and fevere than those ancient Laws, called, The Confessor's; for Walfingham, in his Ypodigma Neuftriæ, tells us, That the Londoners petitioned Queen Maud, ut liceret eis uti Legibus sancti Edvardi & non legibus Patris sui Henrici, quia graves erant; and that her Refusal gave Occasion to their Defection from her, and strenthened Stephen in his Usurpation; who, according to the Method of Usurpers, to fecure himself in the Throne, was willing and ready to gratifie the Defires of the People herein; and furthermore, took his Oath, if. That he would not retain in his Hands the Temporalties of the Bishops; 2 dly, That he would remit the Severity of the Forest Laws; and 3dly, That he would also remit the Tribute of Danegelt: But he performed nothing.

His Times were troublesome, he did little in relation to the Laws; nor have we any Memorial of any Record touching his Proceedings therein, only there are some sew Pipe Rolls of his Time, relating to the Revenue of the Crown.

Henry II. the Son of Maud, succeeded K. H. II. Stephen, he Reigned long, viz. about Thirty
Five Years; and tho' he was not without
great

Digitized by
UNIVERSITY OF ILLINOIS AT
URBANA-CHAMPAIGN

great Troubles and Difficulties, yet he built up the Laws and the Dignity of the Kingdom to a great Height and Perfection. For,

Settles the Coin.

First, In the Entrance of his Government Peace, and he settled the Peace of the Kingdom; he also reformed the Coin, which was much adulterated and debased in the Times and Troubles of King Stephen, Et Leges Henrici avi sui præcepit per totum Regnum inviolabiliter observari. Hoveden.

Constitutions of Clarendors's.

Secondly, Against the Insolencies and Usurpations of the Clergy; he by the Advice of his Council or Parliament at Clarendon, enacted those Sixteen Articles mentioned by Mat. Paris, Sub Anno 1164. They are long, and therefore I remit you thither for the Particulars of them.

'Tis true, Thomas Becket, Archbishop of Canterbury, boldly and infolently took upon him to declare many of those Articles void, especially those Five mentioned in his Epi-Itle to his Suffragans, recorded by Hoveden, viz. 1ft, That there should be no Appeal to the Bishop without the King's Licence. 2dly, That no Archbishop or Bishop should go over the Seas at the Pope's Command without the King's Licence. 3dly, That the Bishop should not excommunicate the King's Tenants in Capite without the King's Licence. Athly, That the Bishop should not have the Conuzance of Perjury, or Fidei Lafionis. And, sthly, That the Clergy should be convened before Lay Judges, and that the King's TABBE

http://www.hathitrust.org/access use#pd

GMT

Generated on 2023-03-20 16:46 Public Domain / http://www.r

Ch. 7. Common Law of England.

Courts should have Conuzance of Churches

and of Tythes.

Thirdly, He raised up the Municipal Laws Improv'd of the Kingdom to a greater Perfection, the Laws. and a more orderly and regular Administration than before; 'tis true, we have no Record of judicial Proceedings to ancient as that Time, except the Pipe Rolls in the Exchequer, which are only Accounts of his Revenue: But we need no other Evidence hereof than the Tractate of Glanville, which tho' perhaps it was not written by that Ranulphus de Glanvilla, who was Justitiarius Anglia under Hen. II. yet it seems to be wholly written at that Time, and by that Book, tho many Parts thereof are at this Day antiquated and altered, and in that long Course of Time, which has elapsed fince that King's Reign, much enlarged, reformed, and amended, yet by comparing it with those Laws of the Confessor and Conqeror, yea, and the Laws of his Grandfather King Hen. I. which he confirmed; it will easily appear, that the Rule and Order, as well as the Administration of the Law, was greatly improved beyond what it was formerly, and we have more Footsteps of their Agreement and Concord herein with the Laws, as they were used from the Time of Edw. I. and downwards, than can be found in all those obsolete Laws of Hen. I. which indeed were but diforderly, confused and general Things, rather the Cases and Shells of directing the way of Administra-At tarevol to fished adversard

139

tion than Institutions of Law, if compared with Glanville's Tractate of our Laws.

Fourtbly, The Administration of the Common Justice of the Kingdom, seems to be wholly difpenfed in the County Courts, Hundred Courts, and Courts Baron, except fome of the greater Crimes reformed by the Laws of King Hen. I. and that Part thereof which was fometimes taken up by the Justitiarius Angliæ: This doubtless bred great Inconvenience, Uncertainty, and Variety in the Laws, viz.

Inconveniencies in the Laws.

First, By the Ignorance of the Judges, which were the Freeholders of the County: For altho' the Alderman or Chief Constable of every Hundred was always to be a Man learned in the Laws; and altho' not only the Freeholders, but the Bishops, Barons, and great Men, were by the Laws of King Hen. I. appointed to attend the County Court; yet they feldom attended there, or if they did, in Process of Time they neglected the Study of the English Laws, as great Men usually do.

Secondly, Another Inconvenience was, That this also bred great Variety of Laws, especially in the several Counties: For the Decision or Judgments being made by divers Courts, and feveral Independent Judges and Judicatories, who had no common Interest among them in their several Judicatories, thereby in Process of Time every feveral County would have feveral Laws, Customs, Rules, and Forms of Proceeding, which is always the Effect of several Independent

# Ch. 7. Common Law of England.

dependent Judicatories administred by seve-

ral Judges. Thirdly, A Third Inconvenience was, That all the Business of any Moment was carried by Parties and Factions: For the Freeholders being generally the Judges, and Conversing one among another, and being as it were the Chief Judges, not only of the Fact, but of the Law; every Man that had a Suit there, fped according as he could make Parties, and Men of great Power and Interest in the County did easily overbear

others in their own Causes, or in such wherein they were interested, either by Relation of Kindred, Tenure, Service, Dependance, or Application. And altho' in Cases of false Judgment, Remedi-

the Law, even as then used, provided a Re-ed; By medy by Writ of false Judgment before the Ordains King or his Chief Justice; and in case the ing Judgment was found to be fuch in the County Court, all the Suitors were confiderably amerced, (which also continued long after in Use with some Severity) yet this proved but an ineffectual Remedy for those Mifchiefs.

Therefore the King tock another and a Justices more effectual Course; for in the 22d Year Itinerant. of his Reign, by Advice of his Parliament held at Northampton, he instituted Justices itinerant, dividing the Kingdom into Six Circuits, and to every Circuit allotting Three Judges, Knowing or Experienced in the Laws of the Realm: These Justices with

T41

Digitized by UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

with their several Circuits are declared by Hoveden, sub eodem Anno, i.e. 22 H. 2. viz.

Robertus Maunsel, for Norfolk, Suffolk, Cambridge, Huntingdon, Bedford, Buckingham, Essex, and Hartford Counties.

2. Hugo de Gundevilla, W. filius Radulpht, O W. Basset, for Lincoln, Nottingham, Derby, Stafford, Warwick, Northampton, and Leicester

Counties.

3. Robertus filius Bernardi, Richardus Giffard, & Rogerus filius Ramfrey, for Kent, Surrey, Sussex, Hampshire, Berks, and Oxon Counties.

4. W. filius Stephani, Bertein de Verdun, & Turstavi filius Simonis, for Hereford, Gloucester,

Worcester, and Salop Counties.

5. Radulphus filius Stephani, W. Ruffus, & Gilbertus Pipard, for the Counties of Wilts,

Dorset, Somerset, Devon, and Cornwall.

6. Robertus de Watts, Radulphus de Glanvilla, & Robertus Picknot, for the Counties of York, Richmond, Lancaster, Copland, Westmerland, Northumberland, and Cumberland.

Hi, (Consilio Archiepiscoporum Episcoporum Comitum & Baronum Regni, &c. apud Nottingham existentium) missi sunt per singulos Angliæ Comitatus & juraverunt quod cuilibet jus suum conservarent illæ sum. Hoveden so. 313. & Mat. Paris, in Anno 1176. And that these Men were well known in the Law, appears by their Companion Radulphus de Glanvilla, who seems to be the Author of the Treatise De Legibus

To those Justices, was afterwards committed the Conuzance of all Civil and Criminal Pleas happening within their Divifions, and likewife Pleas of the Crown, Pleas touching Liberties, and the King's Rights; and the better to acquaint them with their Business, there were certain Assises which were first enacted at Clarendon, and afterwards confirmed at Northampton; they were not much unlike the Capitula Itineris mentioned in our old Magna Charta, but not fo perfect, and are fet down by Hoveden, Ubi supra, and are too long to be here in Notwith ferted: I shall only take Notice of this one, standing viz. Establishing Descents, because I shall what our hereafter have Occasion to use it, Si quie Author obierit Francus Tenens hæredes ipsius remaneant in talem Seisina qualem Pater suus, &c.

\* But besides those Courts in Eyre, there by Glanwere two great standing Courts, viz. The ville and Exchequer, and the Court of Queen's-Bench, others, Vel Curiam coram ipso Rege, vel ejus Justiciario; and it was provided by the above-mentioned Assisa, Quod Justiciae faciant omnes Justicias then also @ Rectitudines Spectantes ad Dominium Regis, in being, & ad Coronam Suam, per breve Domini Regis and Magna vel illorum qui in ejus Loco erunt de Feodo dimidii Militis & infra, Nisi tam grandis sit quærela quod non possit deduci sine Domino Rege vel talis to a cerquam fusticiæ ei reponunt pro dubitatione sua, tain Place

vel ad illos qui in Loco ejus erunt, &c.

http://www.hathitrust.org/access use#pd

Generated on 2023-03-20 Public Domain / http:/

Neither do I find any distinct Mention of fore was the Court of Common Bench in the Time of and un-

writes, it Pleas Was Charta has only fix'd thatCourt which bethis certain.

UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

this King, tho' in the Time of King John there is often Mention made thereof, and the Rolls of that Court of King John's Time are yet extant upon Record, & vide post. (ub Richardi Primi.

Limitation.

The Limitation of the Affise of Novel Disfeifin, is by those Affises appointed to be, a tempore quo Dominus Rex venit in Angliam proximam post Pacis factam inter ipsum, & Re-

gem filium Juum.

Justices. Isinerant.

21 /2931137

Charte bas

moveable

and un-

The same King afterwards, in the Twenty fifth Year of his Reign, divided the Limits of his Itinerant Fustices into Four Circuits or Divisions, and to each Circuit assigned a greater Number of Justices, viz. Five at least, which are thus set down in Hoveden, Folio 337. viz.

Anno 1179. 25 H. 2. Magno Concilio celebrato apud Winde (hores, Communi Consilio Archiepiscoporum Comitum & Baronum & coram Rege Filio suo, Rex divisit Angliam in quatuor Partes, O unicuique partium præfecit viros sapientes ad faciendum Justitiam in Terra sua in hunc Modum.

I. Ricardus Episcopus Winton, Ricardus The-Caurarius Regis, Nicholaus filius Turoldi, Thomas Basset & Robertus de Whitefield, for the Counties of Southampton, Wilts, Gloucester, Somerfet, Devon, Cornwall, Berks and Oxon.

2. Galfridus Eliensis Episcopus, Nicholaus Capellanus Regis, Gilbertus Pipard, Reginald de Wisebeck Capellanus Regis & Gaulfridus Hosce, for the Counties of Cambridge, Huntingdon,

Nor-

# Ch. 7. Common Law of England.

Northampton, Leicester, Warwick, Winchester,

Hereford, Stafford and Salop.

3. Johannes Episcopus Norwicensis, Hugo Murdac Clericus Regis, Michael Bellet, Richardus de le Pec, & Radulphus Brito, for Norfolk, Suffolk, Esfex, Hartford, Middlesex, Kent, Surrey, Sussex. Bucks and Bedford.

4. Galfredus de Luci, Johannes Comyn, Hugo de Gaerst, Radulphus de Glanvilla, W. de Bendings, Alanus de Furnellis, for the Counties of Nottingham, Derby, York, Northumberland. Westmerland, Cumberland, and Lancaster.

Isti sunt Justiciæ in Curia Regis constituti ad

audiendum clamores Populi.

This Prince did these Three notable Things, viz.

First, By this Means, he improved and He imperfected the Laws of England, and doubt- prov'd less transferred over many of the English Laws into Normandy, which, as before is obferved, caused that great Suitableness between their Laws and ours; so that the Similitude did arise much more by a Conformation of their Laws to those of England; than by any Conformation of the English Laws to theirs, especially in the Reigns of King Hen. II. and his Two Sons, King Richard, and King John, both of whom were also Dukes of Normandy.

Secondly, He check'd the Pride and In- Check'd solence of the Pope and the Clergy, by those the Pope. Constitutions made in a Parliament at Clarendon, whereby he restrained the Exorbitant

L

Power

145

Conquered Ireland.

Power of the Ecclefiafticks, and the Exemption they claimed from Secular Jurisdiction. And,

Thirdly, He subdued and conquered Ireland, and added it to the Crown of England, which Conquest was begun by Richard Earl of Stigule or Strongbow, 14 H. 2. But was perfected by the King himself in the Seventeenth Year of his Reign, and for the greater Solemnity of the Bufinefs, was ratified by the Fealties of the Bishops and Nobles of Ireland, and by a Bull of Confirmation from Pope Alexander, who was willing to interest himself in that Business, to ingratiate himself with the King, and to gain a Pretence for that arrogant Ulurpation of disposing of Temporal Dominions. Vide Hoveden, Anno 14 H. 2.

K. Rich. I.

Richard I. eldest Son of King Henry II. fucceeded his Father. I have feen little of Record touching the Juridical Proceedings, either of him, or his faid Father, other than what occurs in the Pipe-Rolls in the Exchequer, which both in the Time of Hen. II. Rich. I. and King John, and all the succeeding Kings, are fairly preserved; and the best Remembrances that we have of this King's Reign, in relation to the Law, are what Roger Hoveden's Annals have delivered down to us, viz.

His Naval

First, He instituted a Body of Naval Laws Laws, &c. in his Return from the Holy Land, in the Island of Oleron, which are yet extant with some Additions; De quibus, Vide Mr. Selden's Mare Clausum, Lib. 2. cap. 24. and I suppose they

http://www.hathitrust.org/access\_use#pd GMT Generated on 2023-03-20 16:46 Public Domain / http://www.h

# Common Law of England.

they are the same which are attributed to him by Mat. Paris, Anno 1196. and he constituted Justices to put them in Execution.

Secondly, He observed the same Method Articles of distributing Justice as his Father had be- of Justigun, by Justices Itinerant per singulos Anglia ces Itine-Comitatus, to whom he delivered two Kinds rant. of Extracts or Articles of Inquiry, viz. Capitula Coronæ, much reformed and augmented from what they were before, and Capitula de Judæis; the whole may be read in Hoveden, fo. 423. Sub Anno 5 R. I. and by those Articles it appears, That at that Time there was a fettled Court for the Common-Pleas, as well as for the Queen's-Bench, tho' it seems that Pleas of Land were then indifferently held in either, as appears by the first and second Articles thereof, where we have, Placita per breve Domini Regis, vel per breve Capitalis Justicia, vel a Capitali Curia Regis coram eis (Justiciis) missa: The former whereof seems to be the Common-Pleas, which held Pleas by Original Writ, which Writ was under the King's Teste when he was in England; but when he was beyond the Seas, it was under the Teste of the Justiciarius Anglia, as the Custos Regni in the King's Absence.

The Power which the Justices Itinerant had to hold Plea in Writs of Right, or the Grand Affize, was sometimes limited, as here by the Articuli Coronæ under Hen. II. to half a Knight's Fee, or under: For here in these Articles it is, De Magnis Affifis que sunt de

centum

http://www.hathitrust.org/access\_use#pd

GMT

Generated on 2023-03-20 16:46 Public Domain / http://www.h

centum Solidis & infra. But in the next Commissions, Instructions, or Capitula Corona, it is, De Magnis Assifis usque ad Decem Libratas Terre & infra.

Weights and Meafures.

148

In his Eighth Year, he established a Common Rule for Weights and Measures throughout England, called Affisa de Mensuris, wherein we find the Measure of Woollen Cloths was then the fame with that of Magna Charta, 9 H. 3. viz. De duobus ulnis infra Lisuras.

In the Year before his Death, the like Justices Errant went through many Counties of England, to whom Articles, or Capitula placitorum Coronæ, not much unlike the former were delivered. Vide Hoveden, sub Anno

1198. fo. 445.

And in the same Year, he issued Commissions in the Trent, Hugh de Neville being Chief Justice; and to those were also delivered Articles of Inquiry, commonly called Affifæ de Foresta, which may be read at large in Hoveden, sub eodem Anno. These gave great Discontent to the Kingdom, for both the Laws of the Forest, and their Execution were rigorous and grievous.

K. John.

King John succeeded his said Brother, both in the Kingdom of England, and Dutchy of Normandy; the Evidence that we have, touching the Progress of the Laws of his Time, are principally Three, viz. First, His Charters of Liberties. 2dly, The Records of Pleadings and Proceedings in his Courts; And 3dly, The Course he took for settling the English Laws in Ireland.

I. Touch-

# Common Law of England.

149

1. Touching the first of these, his Charters of the Liberties of England, and of the Forest, His Charwere hardly, and with Difficulty, gained ters. by his Baronage at Stanes, Anno Dom. 1215. The Collection of the former was, as Mat. Paris tells us, upon the View of the Charter or Laws of King Hen. I. which lays, he contained quasdam Libertates & Leges a Rege Edvardo Sancto, Ecclesia & Magnatibus concessas, exceptis quibusdam Libertatibus quas idem Rex de suo adjecit; and that thereupon the Baronage fell into a Refolution to have those Laws granted by King John. But as it is certain, that the Laws added by King Hen. I. to those of the Confessor were many more, and much differing from his; to the Laws contained in the Great Charter of King John, differed much from those of King Hen. I. Neither are we to think, that the Charter of King John contained all the Laws of England, but only or principally fuch as were of a more comprehensive Nature, and concerned the common Rights and Liberties of the Church, Baronage and Commonalty which were of the greatest Moment, and had been most invaded by King John's Father and Brother.

The lesser Charter, or De Foresta, was to reform the Excesses and Encroachments which were made, especially in the Time of Rich. I. and Hen. II. who had made New Afforestations, and much extended the Rigour of the Forest Laws: And both these Charters do in Substance agree with that

Magna

Magna Charta, & de Foresta, granted and confirm'd in 9 Hen. 3. I shall not need to recite them, or to make any Collections or Inferences from them; they are both extant in the Red Book of the Exchequer, and in Mat. Paris, sub Anno 1215, and the Record and the Historian do Verbatim agree.

Records,

As to the Second Evidence we have of the Progress of the Laws in King John's Time, they are the Records of Pleadings and Proceedings which are flill extant: But altho' this King endeavoured to bring the Law, and the Pleadings and Proceedings thereof, to some better Order than he found it; for faving his Profits whereof, he was very studious, and for the better Reduction of it into Order and Method, we find frequently in the Records of his Time, Fines imposed, pro Stultiloquio, which were no other than Mulcts imposed by the Court for barbarous and diforderly Pleading: From whence afterwards that Common Fine arose, Pro pulchre placitando, which was indeed no other than a Fine for want of it; and yet for all this, the Proceeding in his Courts were rude, imperfect, and defective, to what they were in the enfuing Times of Edw. I. &c. But some few Observables I shall take Notice of upon the Perusal of the Judicial Records of the Time of King John, viz.

His Courts, &c.

Ift, That the Courts of King's-Bench and Common-Pleas were then distinct Courts, and distinct-

# Ch. 7. Common Law of England.

distinctly held from the Begining to the End of King John's Reign.

151

D

2dly, That as yet, neither one nor both of those Courts disparch'd the Business of the Kingdom, but a great Part thereof was difpatch'd by the Justices Itinerant, which were 10metimes in Use, but not without their Intermissions, and much of the Publick Business was dispatch'd in the County Courts, and in other inferior Courts; and so it continued; tho' with a gradual Decrease till the End of King Edw. I. and for some Time after: And hence it was, That in those elder Times, the Profits of those County Courts for which the Sheriff answered in his Farm, de Proficuis Comitatus; also Fines were levied there, and post Fines, and Fines pro licentia concordandi, and great Fines there answered; Fines pro Inquisitionibus babendi, Fines for Misdemeanors, tho' called Amerciaments, arose to great Sums, as will appear to any who shall peruse the ancient Viscontiels.

But, as I said before, the Business of Inferior Courts grew gradually less and less, and consequently their Profits and Business of any Moment came to the Great Courts, where they were dispatch'd with greater Justice and Equality. Besides, the greater Courts observing what Partiality and Brocage was used in the Inferior Courts, gave a pretty quick Ear to Writs of salse Judgment, which was the Appeal the Law allowed from erroneous Judgments in the County Courts; and this, by Degrees, wasted the Credit and Business of those inferior Courts.

L 4 3dly,

3dly, That the Distinction between the King's-Bench and Common-Bench, as to the Point of Communia placita, was not yet, nor for some Time after, settled; and hence it is, that frequently in the Time of King Fohn, we shall find that Common Pleas were held in B. R. yea, in Mich. & Hill. 12 Fohannis, a Fine is levied coram ipfo Rege, between Gilbert Fitz Roger and Helwife his Wife. Plaintiffs, and Robert Barpyard Tenant of certain Lands in Kirby, &c.

And again, whereas there was frequently a Liberty granted anciently by the Kings of England, and allowed, Quod non implacitetur nisi coram Rege; I find inter Placita de diversis Terminis secundo Johannis, That upon a Suit between Henry de Rachola, and the Abbot of Leicester before the Justices de Banco, the Abbot pleaded the Charter of King Richard I. Quod idem Abbas pro nullo respondeat nisi coram ipso Rege vel Capitali Fustitiario suo: and it is ruled against the Abbot, Quia omnia Placita que coram Justic. de Banco tenentur, coram Domino Regi vel ejus Capitali Justitiario teneri intelliguntur. But this Point was afterwards fettled by the Statute of Magna Charta, Quod Communia placita non sequantur Curiam nostram.

4thly, That the four Terms were then held according as was used in After-times with little Variance, and had the same Denomi-

nations they still retain.

5thly, That there were oftentimes considerable Sums of Money, or Horses, or other Things given to obtain Justice; sometimes

'tis said to be, pro babenda Inquisitione ut supra, and inter placita incerti temporis Regis fobannis. The Men of Yarmouth against the Men of Hastings and Winchelsea, Afferunt Domino Regi tres Palfridos, & fex Asturias Narenses ad Inquisitionem habendam per Legates, &c. and frequently the same was done, and often accounted for in the Pipe-Rolls, under the Name of Oblata; and to remedy this Abuse, was the Provision made in King John's and King Hen. III.d's Charters, Nulli Vendemus Fustitiam vel Rectum. But yet Fines upon Originals being certain, have continued to this Day, notwithstanding that Provision; but those enormous Oblata before-mentioned, are thereby remedied and taken away.

6thly, That in all the Time of King John, the Purgation per Ignem & Aquam, or the Trial by Ordeal, continued, as appears by frequent Entries upon the Rolls; but it feems to have ended with this King, for I do not find it in Use in any Time after: Perchance the Barbarousness of the Trial, and Perswasives of the Clergy, prevailed at length to antiquate it, for many Canons

had been made against it.

of Socage as well as Knight's Service Lands to the eldest Son prevailed in all Places, unless there were a special Custom, that the Lands were partible inter Masculos; and therefore, Mich. secundo Johannis, in a rationabili parte Bonorum, by Gilbert Beville against William Beville his elder Brother for Lands in Gunthorpe, the Defendant pleaded, Quod

Suod nunquam partita vel partibilia fuere; and because the Defendant could not prove it, Judgment was given for the Demandant: And by degrees it prevail'd so, that whereas at this Time the Averment came on the Part of the Heir at Law, that the Land nunquam partita vel partibilis extetit; in a little Time after the Averment was turn'd on the other Hand, viz. That tho' the Land was Socage, yet unless he did aver and prove that it was partita & partibilis, he failed in his Demand.

Thirdly, The third Instance of the Progress of King John's Reign, in relation to the Common Law, was his fettling the same in Ireland, which he made his more immediate and particular Bufiness: But hereof we shall add a particular Chapter by it self, when we have shewn you what Proceedings and Progress was made therein in the Time of Edw. I. The many and great Troubles that fell upon King John and the whole Kingdom, especially towards the later End of his Reign, did much hinder the good Effect of fettling the Laws of England, and confequently the Peace thereof, which might have been bottom'd, especially upon the Great Charter. But this Unfortunate Prince and Kingdom were fo intangled with intestine Wars, and with the Invasion of the French, who affisted the English Barons against their King, and by the Advantages and Usurpations that the Pope and the Clergy made

I come therefore to the long and trouble- K. Hen III. some Reign of Hen. III. who was about Nine Years old at his Father's Death; he being born in Festo Sancti Remigii, 1207. and King John died in Festo Sancti Luca, 1216. History and the young King was crowned the 28th of October, being then in the Tenth Year of his Age, and was under the Tutelage of

William Earl-Marshal.

The Nobility were quick and earnest, notwithstanding his Minority, to have the Liberties and Laws of the Kingdom confirm'd; and Preparatory thereto, in the Year 1223, Writs issued to the leveral Counties to inquire, by Twelve good and lawful Knights, Quæ fuerunt Libertates in Anglia tempore Regni Henrici avi sui, returnable guindena Pascha. What Success those Inquisitions had, or what Returns were made thereof, appears not: But in the next Year following, the young King standing in Need of a Supply of Money from the Clergy and Laity, none would be granted, unless the Liberties of the Kingdom were confirm'd as they were express'd and contain'd in the Two Charters of King Fohn; which the King accordingly granted in his Parliament at Westminster, and they were accordingly proclaimed, Ita quod Charta utrorumque Regum in nulla inveniatur dissimiles. Mat. Paris, Anno 1224.

In the Year 1227. The King holding his Parliament at Oxford, and being now of full

Charters.

Age; by ill Advice, causes the Two Charters he had formerly granted to be cancell'd, Hanc occasionem prætendens quod Chartæ illæ concessæ fuerunt & Libertates scriptæ & signatæ dum ipse erat sub Custodia nec sui Corporis aut sigilli aliquam potestatem babuit, unde wiribus carere debuit, Oc. Which Fact occafioned a great Disturbance in the Kingdom: And this Inconstancy in the King, was in Truth the Foundation of all his future Troubles, and yet was ineffectual to his End and Purpose; for those Charters were not avoidable for the King's Nonage, and if there could have been any fuch Pretence, that alone would not avoid them, for they were Laws confirm'd in Parliament.

But the Great Charter, and the Charter of the Forest, did not expire so; for in 1253, they were again sealed and published: And because after the Battle of Evesham, the King had wholly subdued the Barons, and thereby a Jealousie might grow, that he again meant to insringe it; in the Parliament at Marlbridge, cap. 5. they are again consirm'd. And thus we have the great Settlement of the Laws and Liberties of the Kingdom established in this King's Time: The Charters themselves are not every Word the same with those of King John, but they

differ very little in Substance.

This Great Charter, and Charta de Foresta, was the great Basis upon which this Settlement of the English Laws stood in the Time of this King and his Son; there were also some additional Laws of this King yet extant, which

#### Ch. 7. Common Law of England.

which much polished the Common Law, viz. The Statutes of Merton and Marlbridge, and fome others.

We have likewise Two other principal Monuments of the great Advance and Perfection that the English Laws attained to under this King, viz. The Tractate of Bracton, and those Records of Plea, as well in both Benches, as before the Justices Itinerant, the

Records whereof are still extant.

Touching the former, viz. Bracton's Tra- Bracton's chate, it yields us a great Evidence of the Treatife. Growth of the Laws between the Times of Henry II. and Hen. III. If we do but compare Glanville's Book with that of Bracton, we fhall fee a very great Advance of the Law in the Writings of the later, over what they are in Glanville. It will be Needless to instance Particulars; some of the Writs and Process do indeed in Substance agree, but the Proceedings are much more regular and fettled, as they are in Bracton, above what they are in Glanville. The Book it felf in the Beginning feems to borrow its Method from the Civil Law; but the greatest part of the Substance is either of the Course of Proceedings in the Law known to the Author, or of Resolutions and Decisions in the Courts of King's-Bench and Common-Bench, and before Justices Itinerant, for now the inferior Courts began to be of little Use or Esteem.

As to the Judicial Records of the Time Records, of this King, they were grown to a much Temp. greater Degree of Perfection, and the Pleadings

157

http://www.hathitrust.org/access use#pd Generated on 2023-03-20 16:46 GMT Public Domain / http://www.hathi

dings more orderly, many of which are extant: But the great Troubles, and the Civil Wars, that happened in his Time, gave a great Interruption to the legal Proceedings of Courts; they had a particular Commission and Judicatory for Matters happening in Time of War, stiled, Placita de Tempore Turbationis, wherein are many excellent Things: They were made principally about the Battle of Evelham, and after it; and for fettling of the Differences of this Kingdom, was the Dictum, or Edictum de Kenelworth made which is printed in the old Magna Charta.

We have little extant of Resolutions in this King's Time, but what are either remembred by Bracton, or some few broken and scattered Reports collected by Fitzberbert in his Abridgment. There are also fome few Sums or Constitutions relative to the Law, which tho' possibly not Acts of Parliament, yet have obtained in Use as fuch; as De districtione Scaccarii, Statutum Panis & Cervific, Dies Communes in Banco, Statutum Hiberniæ, Stat. de Scaccario, Judicium

Collistrigii, and others.

We come now to the Time of Edw. I. who is well stiled our English Fustiniin; for in his Time the Law, quasi per Saltum, obtained a very great Perfection. The Pleadings are fhort indeed, but excellently good and perspicuous: And altho' for some Time some of those Imperfections and ancient inconvenient Rules obtain'd; as for Instance, in point of Descents, where the middle Brother held

of the Eldest, and dying without Issue, the Lands descended to the Youngest, upon that old Rule in the Time of Hen. II. Nemo potest esse Dominus & Hæres, mentioned in Glanville, at least if he had once received Homage, 13 E. I. Fitz. Avowry 235. Yet the Laws did never in any one Age receive so great and sudden an Advancement; nay, I think I may safely say, all the Ages since his Time have not done so much in reference to the orderly settling and establishing of the distributive Justice of this Kingdom, as he did within a short Compass of the Thirty sive Years of his Reign, especially about the sirst Thirteen Years thereof.

Indeed, many Penal Statutes and Provifions, in relation to the Peace and good Government of the Kingdom, have been fince made. But as touching the Common Administration of Justice between Party and Party, and accommodating of the Rules, and of the Methods and Orders of Proceeding, he did the most, at least of any King since William I. and lest the same as a fix'd and stable Rule and Order of Proceeding, very little differing from that which we now hold and practice, especially as to the Substance and Principal Contex-

ture thereof.

It would be the Business of a Volume to fet down all the Particulars, and therefore I shall only give some short Observations touching the same.

First,

rieft, He perfectly settled the Great Charter, and Charta de Foresta, not only by a Practice consonant to them in the Distribution of Law and Right, but also by that solemn Act passed 25 E. 1. and stilled Confirmationes Chartarum.

Secondly, He established and distributed the several Jurisdictions of Courts within their proper Bounds. And because this Head has several Branches, I shall subdivide

the lame, viz.

r. He check'd the Incroachments and Infolencies of the Pope and the Clergy, by the

Statute of Carlifle.

2. He declared the Limits and Bounds of the Ecclefiastical Jurisdiction, by the Statute of Circumspecte Agatis & Articuli Cleri. For note, Tho' this later Statute was not published till Edw. II. yet was compiled in

the Beginning of Edw. I.

3. He established the Limits of the Court of Common-Pleas, perfectly performing the Direction of Magna Charta, Quod Communia placita non sequantur Curia nostra, in relation to B. R. and in express Terms, extending it to the Court of Exchequer by the Statute of Articuli super Chartas, cap. 4. It is true, upon my first reading of the Placita de Banco of Edw. I. I found very many Appeals of Death, of Rape, and of Robbery therein; and therefore I doubted, whether the same were not held at least by Writ in the Common Pleas Court: But upon better Inquiry, I found many of the Records before Justices I tine-

ercised.

#### Ch. 7. Common Law of England.

Itinerants were enter'd or fill'd up among the Records of the Common-Pleas, which might occasion that Mistake.

4. He establish'd the Extent of the Jurisdiction of the Steward and Marshal. Vide Articuli super Chartas, cap. 2. And,

5. He also settled the Bounds of Inserior Courts, not only of Counties, Hundreds, and Courts Baron, which he kept within their proper and narrow Bounds, for the Reasons given before; and so gradually the Common Justice of the Kingdom came to be administred by Men knowing in the Laws, and conversant in the Great Courts of B. R. and C. B. and before Justices Itinerant; and also by that excellent Statute of Westminster 1. cap. 35. he kept the Courts of Great Men within their Limits under several Penalties, wherein ordinarily very great Incroachments and Oppressions were ex-

The Third general Observation I make is, He did not only explain, but excellently enforc'd, Magna Charta, by the Statute De Tallagio non concedendo, 34 E. I.

Fourthly, He provided against the Interruption of the Common Justice of the Kingdom, by Mandates under the Great Seal, or Privy Seal, by the Statute of Articuli super Chartas, cap 6. which, notwithstanding Magna Charta, had formerly been frequent in Use.

Fifthly, He settled the Forms, Solemnities, and Efficacies of Fines, confining them to M

3.

161

4.

5.

9.

90.

the Common-Pleas, and to Justices Itinerant, and appointed the Place where they brought the Records after their Circuits, whereby one common Repository might be kept of Assurances of Lands; which he did by the Statute De modo levandi Fines, 18 E. 1.

Method for the Safety and Prefervation of the Peace of the Kingdom, and surpressing of Robberies, by the Statute of Winton.

nures, to prevent Multiplicity of Penalties, which grew to a great Inconvenience, and remedied it by the Statute of Quia Emptores Terrarum, 18 E. 1.

Eighthly, He fettled a speedier Way for Recovery of Debts, not only for Merchants and Tradesimen, by the Statutes of Aston, Burnel, of de Mercatoribus, but also for other Persons, by granting an Execution for a Moiety of the Lands by Elegit.

Ninthly, He made effectual Provision for Recovery of Advowsons and Presentations to Churches, which was before infinitely lame and defective, by Statute Westmin-

ster 2. cap. I.

Tenthly, He made that great Alteration in Estates from what they were formerly, by Statute Westminster 2. cap. 1. whereby Estates of Fee-Simple, conditional at Common Law, were turn'd into Estates-Tail, not removable from the Issue by the ordinary Methods of Alienation; and upon this Statute, and for the Qualifications hereof, are the Super-structures

# Ch. 7. Common Law of England.

ftructures built of 4 H. 7. cap. 32. 32 H. 8.

Method, both in the Laws of Wales, and in the Method of their Dispensation, by the

Statute of Rutland.

Twelfthly, In brief, partly by the Learning and Experience of his Judges, and partly by his own wife Interpolition, he filently and without Noile abrogated many ill and inconvenient Usages, both in his Courts of Justice, and in the Country. He rectified and set in Order the Method of collecting his Revenue in the Exchequer, and removed obsolete and illeviable Parts thereof out of Charge; and by the Statutes of Westminster I. and Westminster 2. Gloucester and Westminster 3. and of Articuli Super Chartas. he did remove almost all that was either grievous or impractical out of the Law. and the Course of its Administration, and substituted such apt, short, pithy, and effectual Remedies and Provisions, as by the Length of Time and Experience, had of their Convenience, have stood ever fince without any great Alteration, and are now as it were incorporated into, and become a Part of the Common Law it felf.

Upon the whole Matter, it appears, That the very Scheme, Mold and Model of the Common Law, especially in relation to the Administration of the Common Justice between Party and Party, as it was highly rectified and set in a much better Light and M 2

163

11.

12.

Order by this King than his Predecessors left it to him, fo in a very great Measure it has continued the fame in all fucceeding Ages to this Day; so that the Mark or Epocha we are to take for the true Stating of the Law of England, what it is, is to be confidered, stated and estimated, from what it was when this King left it. Before his Time it was in a great Mealure rude and unpolish'd, in comparison of what it was after his Reduction thereof; and on the other Side, as it was thus polished and ordered by him, so has it stood hitherto without any great or considerable Alteration, abating some few Additions and Alterations which fucceeding Times have made. which for the most part are in the subject Matter of the Laws themselves, and not so much in the Rules, Methods, or Ways of its Administration.

As I before observed some of those many great Accessions to the Perfection of the Law under this King, fo I shall now observe some of those Boxes or Repositories where they may be found, which are of the

following Kinds, viz.

First, The Acts of Parliament in the Time of this King are full of excellent Wisdom and Perspicuity, yet Brevity; but of this, enough before is faid.

Secondly, The Judicial Records in the Time of this King. I shall not mention those of the Chancery, the Close-Patent and Charter Rolls, which yet will very much evidence

the

Repositories of the Law.

I.

2.

# Ch. 7. Common Law of England.

the Learning and Judgment of that Time; but I shall mention the Rolls of Judicial Proceedings, especially those in the King's-Bench and Common-Pleas, and in the Eyres. I have read over many of them, and do generally observe:

1. That they are written in an excellent

Hand.

2. That the Pleading is very short, but very clear and perspicuous, and neither loose or uncertain, nor perplexing the Matter either with Impropriety, Obscurity, or Multiplicity of Words: They are clearly and orderly digested, effectually representing

the Business that they intend.

3. That the Title and the Reason of the Law upon which they proceed (which many times is expressly delivered upon the Record it self) is perspicuous, clear and rational; so that their short and pithy Pleadings and Judgments do far better render the Sense of the Business, and the Reasons thereof, than those long, intricate, perplexed, and formal Pleadings, that oftentimes of late are unnecessarily used.

Thirdly, The Reports of the Terms and Years of this King's Time, a few broken Cases whereof are in Fitzherbert's Abridgment; but we have no successive Terms or Years thereof, but only ancient Manuscripts perchance, not running through the whole Time of this King, yet they are very good, but very brief: Either the Judges then spoke less, or the Reporters were not so ready handed as to take all they said. And hence

M 3 this

3.

169

this Breview makes them the more obscure. But yet in those brief Interlocutions between the Judge and the Pleaders, and in their Definitions, there appears a great deal of Learning and Judgment. Some of those Reports, tho' broken, yet the best of their Kind, are in Lincolns-Inn Library. Quære, if

those Reports are not now published.

Fourthly, The Tracks written or collected in the Time of this wife and excellent Prince, which feem to be of Two Kinds. viz. fuch as were only the Tractates of private Men, and therefore had no greater Authority than private Collections, yet contain much of the Law then in Use, as Fleta the Mirror, Britton and Thornton; or elfe, adly, They were Sums or Abstracts of some particular Parts of the Law, as Novæ Narrationes, Hengam Magna & Parva, Cadit assifa Summa, De Bastardia Summa; by all which, compared even with Bracton, there appears a Growth and a Perfecting of the Law into a greater Regularity and Order.

And thus much shall serve for the several Periods or Growth of the Common Law untill the Time of Edw. I. inclusively, wherein having been fomewhat prolix, I shall be the briefer in what follows, especially seeing that from this Time downwards, the Books and Reports printed give a full Account of the enfuing Progress of the Law.

CHAP.

#### CHAP. VIII.

A Brief Continuation of the Progress of the Laws, from the Time of King Edward II. inclusive, down to these Times.

Maring in the former Chapter been somegress of the Laws, and the incidental Additions they received in the several Reigns of King William II. King Hen. I. King Stephen, King Hen. II. King Richard I. King John, King Hen. III. and King Edw. I. I shall now proceed to give a brief Account of the Progress thereof in the Time of Edw. II. and the succeeding Reigns, down to these Times.

Edward II. succeeding his Father, tho' he K. Ed. II. was an Unfortunate Prince, and by reason of the Troubles and Unevenness of his Reign, the very Law it self had many Interruptions, yet it held its Current in a great Measure according to that Frame and State

that his Father had left it in.

Besides the Records of Judicial Proceedings in his Time, many whereof are still extant, there were some other Things that occurr'd in his Reign which give us some kind of Indication of the State and Condition of the Law during that Reign: As,

M 4 First,

First, The Statutes made in his Time, and especially that of 17 E. 2. stiled De Prerogativa Regis, which tho' it be called a Statute, yet for the most part is but a Sum or Collection of certain of the King's Prerogatives that were known Law long before; as for Instance, The King's Wardship of Lands in Capite attracting the Wardship of Lands held of others; The King's Grant of a Manor not carrying an Advowson Appendant unless named; The King's Title to the Escheat of the Lands of the Normans, which was in Use from the first Defection of Normandy under King John; The King's Title to Wreck, Royal Fish, Treasure Trove, and many others, which were ancient Prerogatives to the Crown.

Secondly, The Reports of the Years and Terms of this King's Reign; these are not printed in any one entire Volume, or in any Series or Order of Time, only some broken Cases thereof in Fitzberber's Abridgment, and in some other Books dispersedly, yet there are many entire Copies thereof abroad very exellently reported, wherein are many Resolutions agreeing with those of Edw. I.'s The best Copy of these Reports that I know now extant, is that in Lincolns-Inn Library, which gives a fair Specimen of the Learning of the Pleaders and Judges of that Time. Quære, If Maynard's Edw. II.

was not printed from that Copy.

K. Ed. III.

King Edw. III. succeeded his Father; his Reign was long, and under it the Law was improved to the greatest Height. The Judges

and

and Pleaders were very learned: The Pleadings are somewhat more polished than those in the Time of Edw. I. yet they have neither Uncertainty, Prolixity, nor Obscurity. They were plain and skilful, and in the Rules of Law, especially in relation to real Actions, and Titles of Inheritance, very learned and excellently polished, and exceeded those of the Time of Edw. I. So that at the latter End of this King's Reign the Laws seemed to be near its Meridian.

The Reports of this King's Time run from the Beginning to the End of his Reign, excepting some few Years between the 10th and 17th, and 30th and 33d Years of his Reign; but those Omitted Years are extant in many Hands in old Manuscripts. And Quære, If they are not all printed in May-

nard's Edw. III.

The Book of Affizes is a Collection of the Affizes that happened in the Time of Edw. III. being from the Beginning to the End extracted out of the Books and Affizes of those that attended the Affizes in the

Country.

The fuffices Itinerant continued by intermitting Vicissitudes till about the 4th of Edw. 3. and some till the 10th of Edw. 3. Their Jurisdiction extended to Pleas of the Crown, or Criminal Causes, Civil Suits and Pleas of Liberties, and Quo Warranto's; the Reports thereof are not printed, but are in many Hands in Manuscript, both of the Times of Edw. I. Edw. II. and Edw. III. full of excellent Learning. Some sew broken Reports of those

those Eyres, especially of Cornwall, Nottingbam, Northampton, and Derby, are collected by Fitzherbert in his Abridgment.

After the 10th of Edw. III. I do not find any Justices Errant ad Communia Placita, but only ad Placita Forestæ; other Things that concerned those Justices Itinerant were supplied and transacted in the Common Bench, for Communia placita, in the King's-Bench and Exchequer for Placita de Libertatibus, and before Justices of Assize, Nisi prius, Oyer and Terminer, and Goal Delivery for Assises and Pleas of the Crown.

And thus much for the Law in the Time

of Edw. III.

K.Rich.II. Richard II. fucceeding his Grandfather, the Dignity of the Law, together with the Honour of the Kingdom, by reason of the Weakness of this Prince, and the Difficulties occurring in his Government, seem'd somewhat to decline, as may appear by comparing the Twelve last Years of Edw. III. commonly called Quadragesms, with the Reports of King Richard II. wherein appears a visible Declination of the Learning and Depth of the Judges and Pleaders.

It is true, we have no printed continued Report of this King's Reign; but I have feen the entire Years and Terms thereof in a Manuscript, out of which, or some other Copy thereof, I suppose Fitzherbert abstracted those broken Cases of this Reign in his

Abridgment.

In

#### Ch. 8. Common Law of England.

In all those former Times, especially from the End of Edw. III. back to the Beginning of Edw. I. the Learning of the Common Law consisted principally in Assizes and real Actions; and rarely was any Title dermined in any personal Action, unless in Cases of Titles to Rents, or Services by Replevin; and the Reasons thereof were principally

thele, viz.

First, Because these ancient Times were great Favourers of the Possessor, and therefore if about the Time of Edw. II. a Dissessor had been in Possessor by a Year and a Day, he was not to be put out without a Recovery by Assize. Again, If the Dissessor had made a Feossent, they did not countenance an Entry upon the Feosse, because thereby he might lose his Warranty, which he might save if he were Impleaded in an Assize or Writ of Entry; and by this Means real Actions were frequent, and also Assizes.

Secondly, They were willing to quiet Men's Possessions, and therefore after a Recovery or Bar in an Assize or real Action, the Party was driven to an Action of a higher Nature.

Thirdly, Because there was then no known Action wherein a Person could recover his Possession, other than by an Assize or a real Action; for till the End of Edw. IV. the Possession was not recovered in an Ejectione survey, but only Damages.

Fourthly, Because an Assize was a speedy and essectual Remedy to recover a Posses-

fion,

171

fion, the Jury being ready Impannell'd, and at the Bar the first Day of the Return. And altho' by Disusage, the Practisers of the Law are not so ready in it, yet the Course thereof in those Times was as ready and as well known to all Professor of the Law as the Course of Ejectione firma is now.

K. Hen. IV. Touching the Reports of the Years and K. Hen. V. Terms of Hen. IV. and Hen. V. I can only fay, They do not arrive either in the Nature of the Learning contained in them, or in the Judiciousness and Knowledge of the Judges and Pleaders, nor in any other Respect arise to the Persection of the last Twelve Years of Edw. III.

K.Hen.VI. But the Times of Hen. VI. as also of

K. Ed. IV. Edw. IV. Edw. V. and Hen. VII. were K. Ed. V. Times that abounded with learned and example cellent Men. There is little Odds in the Usefulness or Learning of these Books, only the first Part of Hén. VI. is more barren, spending it self much in Learning of little Moment, and now out of Use; but the second Part is full of excellent Learning.

In the Times of those Three Kings, Hen. VI. Edw. IV. and Hen. VII. the Learning seems to be much alike. But these two Things are observable in them, and indeed generally in all Reports after the Time of

Edw. III. viz.

First, That real Actions and Assizes were not so frequent as formerly, but many Titles of Land were determined in personal

Digitized by
UNIVERSITY OF ILLINOIS AT
URBANA-CHAMPAIGN

# Ch. 8. Common Law of England.

nal Actions; and the Reasons hereof seem to be,

rst, Because the Learning of them began by little and little to be less kown or understood.

2dly, The ancient Strictness of preserving Possessions to Possessions till Eviction by Action began not to be so much in Use, unless in Cases of Discents and Discontinuances, the latter necessarily drove the Demandant to his Formedon, or his Cui in Vita, &c. But the Descents that toll'd Entry were rare, because Men preserved their Rights to enter, &c. by continual Claims.

adly, Because the Statute of 8 H. 6. had helped Men to an Action to recover their Possessions by a Writ of Forcible Entry, even while the Method of Recovery of Possessions by Ejectments was not known or used.

The Second Thing observable is, That tho' Pleadings in the Times of those Kings were far shorter than afterwards, especially after Hen. VIII. yet they were much longer than in the Time of King Edw. III. and the Pleaders, yea and the Judges too, became Iomewhat too curious therein, Io that that Art or Dexterity of Pleading, which in its Use, Nature and Design, was only to render the Fact plain and intelligible, and to bring the Matter to Judgment with a convenient Certainty, began to degenerate from its primitive Simplicity, and the true Use and End thereof, and to become a Pice of Nicety and Curiofity; which how these later Times have improved, the Length of the Pleadings, the many and unnecessary Repetitions,

the

173

2.

the many Miscarriages of Causes upon small and trivial Niceties in Pleading, have too much witnessed.

I should now say something touching the Times fince Hen. VII. to this Day, and therefore shall conclude this Chapter with fome general Observations touching the Proceedings of Law in these later Times.

And First I shall begin where I left before, touching the Length and Nicety of Pleadings, which at this Day far exceeds not only that short yet perspicuous Course of Pleading which was in the Time of Hen. VI. Edw. IV. and Hen. VII. but those of all Times whatfoever, as our vast Presses of Parchment for any one Plea do abundantly witness.

And the Reasons thereof feem to be

these, viz.

First, Because in ancient Times the Pleadings were drawn at the Bar, and the Exceptions (also) taken at the Bar, which were rarely taken for the Pleasure or Curiofity of the Pleader, but only when it was apparent that the Omission or the Matter excepted to was for the most part the very Merit and Life of the Cause, and purposely omitted or mispleaded because his Matter or Cause would bear no better: But now the Pleadings being first drawn in Writing, are drawn to an excessive Length, and with very much Labourousness and Care enlarged, left it might afford an Exception not intended by the Pleader, and which

# Ch. 8. Common Law of England.

which could be easily supplied from the Truth of the Case, lest the other Party should catch that Advantage which commonly the adverse Party studies, not in Contemplation of the Merits or Justice of the Cause, but to find a Slip to fasten upon, tho' in Truth, either not material to the Merits of the Plea, or at least not to the Merits of the Cause, if the Plea were in all Things conform to it.

Secondly, Because those Parts of Pleading which in ancient Times might perhaps be material, but at this Time are become only mere Styles and Forms, are still continued with much Religion, and so all those anci-

with much Religion, and so all those ancient Forms at first introduced for Convenience, but now not necessary, or it may be antiquated as to their Use, are yet continued as Things wonderfully material, tho' they only swell the Bulk, but contribute nothing

to the Weight of the Plea.

Thirdly, These Pleas being mostly drawn by Clerks, who are paid for Entries and Copies thereof, the larger the Pleadings are, the more Profits come to them, and the dearer the Clerk's Place is, the dearer he

makes the Client pay.

Fourthly, An Overforwardness in Courts to give Countenance to frivolous Exceptions, tho' they make nothing to the true Merits of the Cause; whereby it often happens that Causes are not determined according to their Merits, but do often miscarry for inconsiderable Omissions in Pleading.

But

175

But, Secondly, I shall consider what is the Reason that in the Time of Edw. I. one Term contained not above two or three Hundred Rolls, but at this Day one Term contains two Thousand Rolls or more.

The Reasons whereof may be these, viz.

16, Many petty Businesses, as Trespasfes and Debts under 40 s. are now brought to Westminster, which used to be dispatched in the County or Hundred Courts; and yet the Plaintiffs are not to be blamed, because at this Day those Inferior Courts are so ill ferved, and Justice there so ill administred. that they were better feek it (where it may be had) at Westminster, tho' at somewhat more Expence.

2dly, Multitudes of Attornies practifing in the Great Courts at Westminster, who are ready at every Market to gratifie the Spleen.

Spight or Pride, of every Plaintiff.

adly, A great Encrease of People in this Kingdom above what they were anciently, which must needs multiply Suits.

4thly, A great Encrease of Trade and Trading Persons, above what there were in ancient Times, which must have the like Effect.

5thly, Multitudes of new Laws, both Penal and others, all which breed new Questions. and new Suits at Law, and in particular, the Statute touching the devising of Lands, cum multis aliis.

6thly, Multiplication of Actions upon the Case, which were rare formerly, and

thereby

And herewith I shall conclude this Chapter, shewing what Progress the Law has made, from the Reign of King Edw. I. down

to these Times. and II was ve house

N

CHAP.

#### CHAP. IX.

Concerning the settling of the Common Law of England in Ireland and Wales: And some Observations touching the Isles of Man, Jersey and Guernsey, &c.

Ireland.

THE Kingdom of Ireland being conquered by Hen. II. about the Year 1171. He in his great Council at Oxon, constituted his younger Son, John, King thereof, who profecuted that Conquest so fully, that he introduced the English Laws into that Kingdom, and fwore all the great Men there to the Observation of the same, which Laws were, after the Decease of King John, again reinforc'd by the Writ of King Hen. III. reciting that of King John, Rot. Clauf. 10 H. 3. Memb. 8, & 10. Vide infra, & Pryn. 252, 253, Oc.

And because the Laws of England were not fo fuddenly known there, Writs from Time to Time iffued from hence, containing divers Capitula Legum Angliæ, and commanding their Observation in Ireland, as Rot. Parl. 11 H. 3. the Law concerning Tenancy by Curtefy, Rot. Clauf. 20 H. 3. Memb. 3. Dorfo. The Law concerning the Preference of the Son born after Marriage, to the Son born of the same Woman before Marriage, or Bastard eigne & Mulier puisne, Rot. Claus.

20 H.

# Ch. 9. Common Law of England.

20 H. 3. Memb. 4. in Dorso: So the Law concerning all the Parceners inheriting without doing Homage, and feveral Transmis-

fions of the like Nature.

For tho' King Hen. II. had done as much to introduce the English Laws there, as the Nature of the Inhabitants or the Circumstances of the Times would permit; yet partly for want of Sheriffs, that Kingdom being then not divided into Counties, and partly by reason of the Instability of the Irishig he could not fully effect his Design: And therefore, King John, to supply those Defects as far as he was able, divided Leinster and Munster into the several Counties of Dublin, Kildare, Meath, Uriel, Caterlogb, Kilkenny, Wexford, Waterford, Cork. Limerick, Tiperary, and Kerry; and appointed Sheriffs and other Officers to govern 'em after the Manner of England; and likewise caused an Abstract of the English Laws under his Great Seal to be transmitted thither. and deposited in the Exchequer at Dublin: And foon after, in an Irish Parliament, by a general Confent, and at the Instance of the Vide 4th Irish, he ordain'd, That the English Laws Inft. 149. and Cultoms should thenceforth be observed in Ireland, and in order to it, he fent his Judges thither, and crected Courts of Judicature at Dublin.

But notwithstanding these Precautions of King John, yet for that the Brebon Law. and other Irish Customs, gave more of Power to the great Men, and yet did not restrain the Common People to fo strict and regular N 2

179

UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

a Discipline as the Laws of England did. Therefore the very English themselves became corrupted by them, and the English Laws soon became of little Use or Esteem, and were look'd upon by the Irish and the degenerate English as a Yoke of Bondage; so that King Hen. III. was oftentimes necessisted to revive 'em, and by several successive Writs to enjoin the Observation of them. And in the Eleventh Year of his Reign he sent the following Writ, viz. N. B. This Writ is curtail'd by my Lord Cook.

1. Inft.

Henricus Rex, Oc. Baronibus Militibus & aliis libere Tenentibus Lageniæ, salutem, &c. Satis ut credimus vestra audivit discretio, quod cum bonæ memoriæ Johannes, quondam Rex Angliæ Pater Noster venit in Hiberniam, ipse duxit secum viros discretos & Legis peritos, quorum Communi Consilio, & adinstantiam Hibernienfium Statuit & præcepit Leges Anglicanas teneri in Hibernia, ita quod Leges easdem in scriptis readactas reliquit sub sigillo suo ad Scaccar. Dublin. Cum igitur Consuctudo & Lex Angliæ fuerit, quod si aliquis desponsaverit aliquam Mulierem, sive Viduam sive aliam hæreditatem babentem, & ipse postmodum ex ea prolem suscitaverit, cujus clamor auditus fuerit infra quatuor parietes idem Vir si supervixerit ipsam uxorem suam, babebit tota vita sua Custodiam Hæreditatis uxoris suæ, licet ea forte habuerit Hæredem de primo viro suo qui fuerit Plenæ ætatis vobis Mandamus injungentes quatenus in loquela quæ est in Curia Willi. Com. Maresc. inter Mauritium Fitz Gerald Petent. & Galfridum de Marisco 711-

http://www.hathitrust.org/access\_ GMT Generated on 2023-03-20 Public Domain / http:/

Justiciarium nostrum Hiberniæ tenentem, vel in alia Loquela quæ fuerit in Casu prædicto nullo modo Justitiam in contrar' facere præsumatis. Tefte Rege apud Westin. 10 De-

cemb. Anno 11º Regni Nostri.

And Note, In the same Year another Writ was fent to the Lord Justice, Commanding him to aid the Episcopal Excommunications in Ireland with the Secular Arm, as in

England was used.

And about this Time, Hubert de Burgo, the Chief Justice of England, and Earl of Kent, was made Earl of Connaught, and Lord Justice of Ireland during Life; and because he could not Personally attend, he on March the 10th, 1227. appointed Richard de Burgo to be his Deputy, or Lord Justice, to whom the King fent the following Writ:

Rex dilecto & fideli suo Richardo de Burgo Fusticiario suo Hiberniæ salutem. Mandamus vobis firmiter Præcipientes, quatenus certo die & loco faciatis venire coram vobis, Archiepiscopos Episcopos Abbates Priores Comites & Barones Milites & libere Tenentes & Ballivos Singulorum Comitatuum, & coram eis publice legi faciatis Chartam Domini Johannis Regis Patris nostri Cui sigillum suum appensum est, quam sieri fecit, O jurari a Magnatibus Hiberniæ de Legibus O consuetudinibus Anglorum Observandis in Hibernia, & Pracipiatis eis ex parte nostra, quod Leges illas & consuetudines in Charta prædicta contentas de cetero firmiter teneant & observent. Et boc

N 3

boc idem per singulos Comitatus Hibernia clamari faciatis, & teneri probibentes firmiter ex parte nostra & forisfacturam nostram, ne quis contra boc Mandatum nostrum, venire præsumat. excepto quod nec de Morte nec de catallis hibernensium occisorum nibil statuatur ex parte nostra citra quindecim dies a Sancti Michaelis, Anno Regni Nostri, 12°. Super quo respectum dedimus Magnat. nostri de Hib. usque ad Terminum prædict. Teste Meipso apud Westm. 8° die Maii, Anno Regni Nostri, 12°.

And about the 20th Year of Hen. III. feveral Writs were fent into Ireland, especially directing several Statutes which had been made in England to be put in Ule, and to be observed in Ireland; as the Statute of Merton in the Case of Bastardy, &c.

But yet it feems by the frequent Grants that were made afterwards to particular Native Irish Men, Quod legibus utantur Anglicanis, That the Native Irish had not the full Priviledge of the English Laws, in relation at least to the Liberties of English Men, till about the Third of Edw. III. Vide Rot. Clauf. 2 E. 2. Memb. 17.

As the Common Law of England was thus by King John and Hen. III. introduced into Ireland, so in the Tenth of Hen. VII. all the precedent Statutes of England were there fettled by the Parliament of Ireland. 'Tis true, many ancient Irish Customs continued in Ireland, and do continue there even unto this Day; but fuch as are contrary to the

### Ch. 9. Common Law of England.

Laws of England are disallowed, Vide Davis's Reports, the Case of Tanistry.

Wales.

As touching Wales, That was not always the Feudal Territory of the Kingdom of England; but having been long governed by a Prince of their own, there were very many Laws and Customs used in Wales, utterly strange to the Laws of England, the Principal whereof they attribute to

their King Howell Dha.

After King Edw. I. had subdued Wales, and brought it immediately under his Dominion; He first made a strict Inquisition, touching the Welsh Laws within their several Commotes and Seigniores, which Inquisitions are yet of Record: After which, in the 12th of Edw. I. the Statute of Rutland was made, whereby the Administration of Justice in Wales was settled in a Method very near to the Rule of the Law of England. The Preamble of the said Statute is notable, viz.

Edvardus Dei gratia Rex Angliæ Dominus Hiberniæ & Dux Acquitaniæ omnibus Fidelibus suis de Terra sua de Snodon & de aliis terris suis in Wallia Sabutem in Domino. Divina providentia quæ in sua Dispositione non fallitur, interalia suæ Dispensationis Munera, quibus nos & Regnum nostrum Angliæ decorari dignata est, Terram Walliæ cum incolis suis prius nobis juri Feodali subjectam, tam sui gratia in proprietatis nostræ Dominium, obstaculis quibuscunque cessantibus, totaliter & cum integritate convertit, & Coro-

Coro-

Coroniæ Regni prædicti tantum partem corporis, ejusdem annexuit & univit. Nos, &c.

According to the Method in that Statute prescribed, has the Method of Justice been hitherto administred in Wales, with such Alterations and Additions therein as have been made by the several subsequent Statutes of 27 and 24 H.8. &c.

The Ine

of Man.

Touching the Isle of Man. This was sometimes Parcel of the Kingdom of Norway, and governed by particular Laws and Cuftoms of their own, tho many of them hold Proportion, or bear some Analogy, to the Laws of England, and probably were at first and originally derived from hence; seeing the Kingdom of Norway as well as the Isle of Man have anciently been in Subjection to the Crown of England. Vide Leges Willi. Primi, in Lambard's Saxon Laws.

Berwick.

Berwick was sometimes Parcel of Scotland, but was won by Conquest by King Edw. I. and after that lost by King Edw. II. and afterwards regained by Edw. III. It was governed by the Laws of Scotland, and their own particular Customs, and not according to the Rules of the Common Law of England, surther than as by Custom it is there admitted, as in Liber Parliament, 21 E. 1. in the Case of Moyne and Bartlemew, pro Dote in Berwick; yet now by Charter, they send Burgesses to the Parliament of England.

Touching the Islands of Fersey, Guernsey, Sark, and Alderney; They were anciently

Fersey, Guernsey, &c.

#### Common Law of England. Ch. 9.

a Part of the Dutchy of Normandy, and in that Right, the Kings of England held them till the Time of King John; but although King John, as is before shewn, was unjustly deprived of that Dutchy, yet he kept the Mands; and when after that, they were by Force taken from him, he by the like Force regained them, and they have ever fince continued in the Possession of the Crown

ot England.

As to their Laws, they are not governed by the Laws of England, but by the Laws and Customs of Normandy. But not as they are at this Day; for fince the actual Division and Separation of those Islands from that Dutchy, there have been feveral New Edicts and Laws made by the Kings of France which have much altered the old Law of Normandy, which Edicts and Laws bind not in those Islands, they having been ever fince King John's Time at least under the actual Alle-

giance of England

And hence it is, that tho' there be late Collections of the Laws and Cultonis of Normandy, as Terrier and some others, yet they are not of any Authority in those Islands; for the Decision of Controversies, as the Grand Coutumier of Normandy is, which is (at least in the greatest part thereof) a Collection of the Laws of Normandy as they stood before the Disjoining of those Islands from the Dutchy, viz. before the Time of King Hen. III. tho' there be in that Collection some Edicts of the Kings of France which were made after that Disjunction;

and

185

and those Laws, as I have shewn before, tho' in some Things they agree with the Laws of England, yet in many Things they differ, and in some are absolutely repugnant.

And hence it is, that regularly Suits arising in those Islands are not to be tried or determined in the King's Courts in England, but are to be heard, tried, and determined in those Islands, either before the ordinary Courts of furats there, or by the fusices Itinerant there, commissioned under the Great Seal of England, to determine Matters there arising; and the Reason is, because their Course of Proceedings, and their Laws, differ from the Course of Proceedings and the Laws of England.

And altho' it be true, that in ancient Times, since the Loss of Normandy, some scattering Instances are of Pleas moved here touching Things done in those Islands, yet the general settled Rule has been to remit them to those Islands, to be tried and determined there by their Law; tho' at this Day the Courts at Westminster hold Plea of all transitory Actions wheresoever they arise, for it cannot appear upon the Record where

they did arise.

Mic. 42 E. 2. Rot. 45. coram Rege, A great Complaint was made by Petition, against the Deputy Governor of those Islands, for divers Oppressions and Wrongs done there: This Petition was by the Chancellor delivered into the Court of B. R. to proceed upon it, whereupon there were Pleadings on both Sides; but because it appeared to be

be for Things done and transacted in the said Islands, Judgment was thus given: Et quia Negotiam prædict in Curia hic terminari non potest, eo quod furatores Insulæ prædict coram fustitiariis hic wenire non possunt nec de fure debent, Nec aliqua Negotia infra Insula prædicta emergentia terminari non debewt nisi secundum Consuet. Insulæ Predictæ. Ideo Recordum retro traditur Cancellario ut inde siat Commissio Domini Regis ad Negotia prædicta in Insula prædicta audienda & Terminanda secundum Consuet. Insulæ prædictæ.

And accordingly 14 Junii, 1565. upon a Report from the Attorney General, and Advice with the two Chief Justices, a general Direction was given by the Queen and her Council, That all Suits between the Islanders, or wherein one Party was an Islander, for Matters arising within the Islands, should be there heard and determined.

But still this is to be taken with this Distinction and Limitation, viz. That where the Suit is immediately for the King, there the King may make his Suit in any of the Courts here, especially in the Court of King's-Bench: For Instance, in a Quare Impedit brought by the King in B. R. here for a Church in those Islands; so in a Quo Warranto for Liberties there; so a Demand of Redemption of Lands fold by the King's Tenant within a Year and a Day according to the Custom of Normandy; so in an Information for a Riot, or grand Contempt against a Governor deputed by the King. Thefe and the like Suits have been maintained

tained by the King in his Court of King's-Bench here, tho' for Matters arising within those Islands: This appears, Paschæ 16 E. 2. coram Rege, Rot. 82. Mich. 18 E. 2. Rot. 123.

124, 125. & Paf. 1 E. 3. Rot. 59.

And for the same Reason it is, that a Writ of Habeas Corpus lies into those Islands for one Imprisoned there, for the King may demand, and must have an Account of the Cause of any of his Subjects Loss of Liberty; and therefore a Return must be made of this Writ, to give the Court an Account of the Cause of Imprisonment; for no Liberty, whether of a County Palatine, or other, holds Place against those Brevia Mandatoria, as that great Instance of punishing the Bishop of Durbam for refusing to execute a Writ of Habeas Corpus out of the King's-Bench, 33 E. I. makes evident.

And as Pleas arising in the Islands regularly, ought not in the first Instance to be deduced into the Courts here, (except in King's Case;) so neither ought they to be deduced into the King's Courts here in the fecond Instance; and therefore if a Sentence or Judgment be given in the Islands, the Party grieved thereby, may have his Appeal to the King and his Council to reverse the same if there be Cause. And this was the Course of Relief in the Dutchy of Normandy, viz. by Appeal to the Duke and his Council; and in the same Manner, it is still observed in the Case of erroneous Decrees or Sentences in those Islands, viz. To Appeal to the King and his Council. But

But the Errors in fuch Decrees or Sentences are not examined by Writ of Error in the King's-Bench, for these Reasons,

1st, Because the Courts there, and those here, go not by the same Rule, Method, or Order of Law:

And 2dly, Because those Islands, though they are Parcel of the Dominion of the Crown of England, yet they are not Parcel of the Realm of England, nor indeed ever were; but were anciently Parcel of the Dutchy of Normandy, and are those Remains thereof which the Power of the Crown and Kingdom of France have not been able to wrest from the Kingsof England.

Whoever defires to know further, touching the History, Laws, Customs, Religion, and Priviledges of these Islands, may perule the Tract, entitled An Account of the Isle of Fersey, written by Mr. Philip Falle, and published in the Year, 1694.

to be the Means of Realog of the Contorminion of mair Laws note the Laws of

fished a monthly wasm bus to building but

began with a Conformation of

he First of these Inquiries : It

CHAP,

But the Error in facin Decrees or Sen-

Concerning the Communication of the Laws of England unto the Kingdom of Scotland.

The Ecause this Inquiry will be of Use. not only in it felf, but also as a Parallel Discovery of the Transmission of the English Laws into Scotland, as before is shewn they were into Normandy; I shall in this Chapter pursue and solve these several Queries, viz. Whoever defines to know further

If, What Laws of Scotland hold a Congruity and Suitableness with those of England.

2dly, Whether these be a sufficient Ground for us to suppose, that that Similitude or Congruity began with a Conformation of their Laws to those of England. And,

adly, What might be reasonably judged to be the Means or Reason of the Conformation of their Laws unto the Laws of England.

As to the First of these Inquiries; It is plain, beyond all Contradiction, that many of the Laws of Scotland hold a Congruity and Similitude, and many of them a perfect Identity with the Laws of England, at least

25

as the English Laws stood in the Times of Hen. II. Richard I. King John, Henry III. and Edw. I. And altho' in Scotland, Use hath always been made of the Civil Law, in point of Direction or Guidance, where their Municipal Laws, either Customary or Parliamentary failed; yet as to their particular Municipal Laws, we shall find a Resemblance, Parity and Identity, in their Laws with the Laws of England, anciently in Use; and we need go no further for Evidence hereof, than the Regiam Majestatem, a Book published by Mr. Skeen in Scotland. It would be too long to Instance in all the Points that might be produced; and therefore I shall single out some few, remitting the Reader for his further Satisfaction to the Book it felf.

Dower of the Wife to be the Third Part of her Husband's Lands of Inheritance; the Writ to recover the same; the Means of Forseiting thereof by Treason or Felony of the Husband, or Adultery of the Wife; are in great Measure conformable to the Laws of England. Vide Regiam Majestatem, Lib. 2. cap. 16, 17. and Quoniam Attachia-

The Exclusion of the Descent to the elder Brother by his receiving Homage, which tho' now antiquated in England, was anciently received here for Law, as appears by Glanville, Lib. 7. cap. 1. and Vide Regiam Majestatem, Lib. 2. cap. 22.

The Exclusion of Daughters from Inheritances by a Son: The Descent to all the Daugh-

mento, cap. 85.

Daughters in Coparcenary for want of Sons the chief House allotted to the eldest Daughter upon this Partition; the Descent to the Collateral Heirs, for want of Lineal, &c. Ibid. cap. 24, 25, 26, 27, 28, 33, 34. But this is now altered in some Things per Stat. Rob. cap. 3.

The full Age of Males 21, of Females 14, to be out of Ward in Socage 16. Ibid.cap. 42.

That the Custody of Idiots belonged to

the King, Ibid. cap. 46.

The Custody of Heirs in Socage belong to the next of Kin, to whom the Inheritance can't descend. Vide Regiam Majest.

-cap. 47.

The Son born before Marriage, or Bastard eigne, not to be legitimate by the Marriage after, nor was he hereditable by the ancient Laws of Scotland, though afterward altered in Use, as it seems, Regiam Majest. cap. SI.

The Confiscation of Bona Usurariorum, after their Death, conform to the old Law here used. Ibid. cap. 54. tho' now

antiquated.

The Laws of Escheats, for want of Heirs,

or upon Attainder. Ibid. cap. 55.

The Acquital of Lands given in Frank-Marriage, till the fourth Degree be past, Ibid. cap. 57.

Homage, the Manner of making it with the Persons, by, or to whom, as in England,

Ibid. cap. 61, 62, 63, 60c.

The Relief of an Heir in Knights Service, of full Age, Regiam Majestatem, cap. 17. -dguald 3

## Ch. 10. Common Law of England.

The Preference of the Sifter of the whole Blood, before the Sifter of the half Blood.

Quoniam Attachiamento, cap. 89.

The fingle Value of the Marriage, and Forfeiture of the double Value, precifely agree with the Statute of Marlbridge. Ibid. cap. 91.

The Forfeiture of the Lord's disparageing his Ward in Marriage, agrees with Magna Charta, and the Statute of Marlbridge.

Quoniam Attachiamento, cap. 92.

The Preference of the Lord by Priority to the Custody of the Ward. Ibid. cap. 95.

The Punishment of the Ravisher of a Ward, by two Years Imprisonment, &c. as here. Ibid. cap. 90.

The Jurisdiction of the Lord in Infang-

theof. Ibid. cap. 100.

Goods confiscate, and Deodands, as here, Liber De Modo tenendi Cur. Baron. cap. 62, 63, 64.

And the like of Waifs. Ibid. cap. 65. Widows, not to marry without Confent of the Lord, Statute Mesei. 2. cap. 23.

Wreck of the Sea, defined precifely as in

the Statute Westm. 2. Vide Ibid. cap. 25.

The Division of the Deceased's Goods, one Third to the Wise, another Third to the Children, and another to the Executor, &c. conformable to the ancient Law of England, and the Custom of the North to this Day. Lib. 2. cap 37.

Also the Proceedings to recover Possessions, by Mortdancester, Juris Utrum, Assis de Novel disseis, &c. The Writs and Process

ar

are much the same with those in England, and are directed according to Glanville, and the old Statutes in the Time of Edw. I. and Hen. III. Vide Regiam Majestat. Lib. 3. cap. 27. to 26.

Many more Instances might be given of many of the Municipal Laws of Scotland, either precifely the same with those in England, or very near, and like to them: Though it is true, they have some particular Laws that hold not that Conformity to ours, which were introduced either by Particular or Common Customs, or by Acts of their Parliaments. But, by what has been faid and inflanced in, it appears, That like as between the Laws of England and Normandy, so also between the Laws of England and Scotland, there was anciently a great Similitude and Likeness.

ry.

I come therefore to the Second Thing I propos'd to inquire into, viz. what Evidence there is, That those Laws of Scotland were either defumed from the English Laws, or from England, transmitted thither in such a manner, as that the Laws here in England were as it were the Original or prime Exemplar, out of which those parallel or similar Laws of Scotland were copied or tranfcribed into the Body of their Laws; and this appears evident on the following Reafons, viz.

First, For that Glanville (which, as has been observed, is the ancientest Collection we have of English Laws) seems to be even tran-

transcribed in many entire Capita of the Laws above-mentioned, and in some others where Glanville doubts, that Book doubts: and where Glanville follows the Practice of the Laws then in Use, tho' altered in succeeding Times, at least after the Reign of Edw. I. there the Regiam Majestatem does

accordingly; for Instance, viz.

Glanville, Lib. 7. cap. 1. determine, That a Man can't give away part of the Lands which he held by Hereditary Descent unto his Bastard, without the Consent of his Heir, and that he may not give all his Purchases from his eldest Son; and this is also declared to be the Law of Scotland accordingly, Regiam Majestatem, Lib. 2. cap. 19. 20. Tho' fince Glanville's Time, the Law has been altered in England.

Also Glanville, Lib. 7. cap. 1. makes a great Doubt, Whether the fecond Son, being enfeoffed by the Father, and dies without Issue; whether the Land shall return to to the Father, or descend to his eldest, or to his youngest Brother; and at last gives fuch a Decision as we find almost in the fame Terms and Words recited in the Oueftion and Decisions laid down in Regians

Majest. Lib. 2. cap. 22.

Again, Glanville, Lib. 7. cap. 1. makes it a difficult Question in his Time, Whether the eldest Son dying in the Life-time of his Father, having Issue, the Nephew or the youngest Son shall inherit; and gives the Arguments pro & contra: And Regiam Ma-

iestatem.

jestatem, cap. 33. seems to be even a Transcript thereof out of Glanville.

And further, the Tract concerning Affifes, and the Time of Limitation, the very Form of the Writs, and the Method of the Process, and the Directions touching their Proceedings are but Transcripts of Glanville, as appears by comparing Regiam Majestatem, Lib. 3. cap. 36. with Glanville, Lib. 13. cap. 32. and the Collector of those Laws of Scotland in all the before-mentioned Places, and divers others, quotes Glanville as the Pat-

tern at least of those Laws.

But Secondly, A second Evidence is, because many of the Laws which are mentioned in the Regiam Majestatem Quoniam Attachiamento, and other Collections of the Scotifi Laws, are in Truth very Translations of several Statutes made in England in the Times of King Hen. III. and King Edw. I. For Instance; the Statute of their King Robert I. cap. 1. touching Alienations to Religious Men, is nothing else but an Enacting of the Statute of Mortmain, 13 E. I. cap. 13. The Law above-mentioned, touching the Disparagement of Wards, is desumed out of Magna Charta, cap. 6. and the Statute of Merton, cap. 6. So the Law above said, against Ravishers of Wards, is taken out of Westm. 2. cap. 25. So the faid Law of the double Value of Marriage, is taken out of Westm. 1. cap 22. The Law concerning Wreck of the Sea, is but a Transcript out of Westm. 1. cap. 4. and divers other Instances of like Nature might be given, whereby it may appear,

## Ch. 10. Common Law of England.

appear, that very many of those Laws in Scotland which are a part of their Corpus furis, bear a Similitude to the Laws of England, and were taken as it were out of those Common or Statute Laws here, that obtain'd in the Time of Edw. I. and before, but especially such as were in Use or Enacted in the Time of Edw. I. and the Laws of England, relative to those Matters, were as it were the Original and Exemplar from whence those Similar or Parallel Laws of Scotland were derived or borrowed.

Thirdly, I come now to consider the Third 3. Inqui-Particular, viz. By what Means, or by what ry. Reason this Similitude of Laws in England and Scotland happened, or upon what Ac-

count, or how the Laws of England at least in many Particulars, or Capita Legum, came to be communicated unto Scotland, and they seem to be principally these Two, viz. First, The Vicinity of that Kingdom to this. And Secondly, The Subjection of that King-

dom unto the Kings of England, at least for fome considerable Time.

Touching the former of these; First, It is very well known, that England and Scotland made but one Island, divided not by the Sea or any considerable Arm thereof, but only by the Interjacency of the River Tweed, and some Desert Ground, which did not hinder any easie common Access of the People of the one Kingdom to the other: And by this Means, First, The Intercourse of Commerce between that Kingdom and this was very frequent and usual,

O 3 especially

especially in the Northern Counties, and this Intercourse of Commerce brought unto those of Scotland an Acquaintance and Familiarity with our English Laws and Customs, which in Process of Time were adopted and received gradually into Scotland.

Again, Secondly, This Vicinity gave often Opportunities of transplanting of Perfons of either Nation into the other, especially in those Northern Parts, and thereby the English transplanted and carried with them the Use of their Native Customs of England, and the Scots transplanted hither, became acquainted with our Customs, which by occasional Remigrations were gradually translated and became diffus'd and planted in Scotland; and it is well known, that upon this Account some of the Nobility and great Men of Scotland had Poffessions here as well as there: The Earls of Angus were not only Noblemen of Scotland, but were also Barons of Parliament here, and fate in our English Parliaments, as appears by the Summons to Parliament, Tempore Edwardi Tertii.

Again, Thirdly, The Kings of Scotland had Feodal Poffessions here; for Instance, The Counties of Cumberland, Northumberland and Westmerland, were anciently held of the Crown of England by the Kings of Scotland, attended with several Vicissitudes and Changes until the Feast of St. Michael, 1237. at which Time Alexander King of Scotland sinally released his Pretensions thereunto, as appears by the Deed thereof enter'd into the Red-Book of the Exchequer, and the Par-

liament

liament Book of 20 E. I. and in Confideration thereof, Hen. III. gave him the Lands of Penreth and Sourby, Habend' fibi Heredibus Juis Regibus Scotiæ, and by Vertue of that Special Limitation, they came to John the eldest Son of the eldest Daughter of Alexander King of Scotland, together with that Kingdom; but the Land of Tindale, and the Manor of Huntingdon, which were likewise given to him and his Heirs, but without that Special Limitation, Regibus Scotiae, fell in Coparcenry, one Moiety thereof to the faid Fohn King of Scotland, as the Issue of the eldest Daughter, and the other Moiety to Hastings, who was descended from the younger Daughter of the faid Alexander: But those Possessions came again to the Crown of England by the Forfeiture of King John of Scotland, who through the Favour of the King of England he had Restitution of the Kingdom of Scotland, yet never had Restitution of those Possessions he had in England, and forfeited and loft by his levying War against the Kingdom of England as aforelaid.

And thus I have shewn, that the Vicinity of the Kingdoms of England and Scotland, and the Consequence thereof, viz. Translations of Persons and Families, Intercourse of Trade and Commerce, and Possessions obtained by the Natives of each Kingdom in the other, might be one Means for Communicating our Laws to

them.

0 4

But

But Secondly, There was another Means far more effectual for that End, viz. The Superiority and Interest that the Kings of England obtain'd over the Crown and Kingdom of Scotland, whereby it is no Wonder that many of our English Laws were transplanted thicher by the Power of the English Kings. This Interest, Dominion, or Superiority of the Kings of England in the Realm of Scotland may be considered these Two ways, viz. 1st, How it stood antecedently to the Reign of King Edw. I. And 2dly, How it stood in his Time.

Touching the former of those, I shall not trouble my self with collecting Arguments or Authorities relating thereto; he that Desires to see the whole Story thereof, let him consult Walsingham, sub Anno 18 Edw. I. as also Rot. Parl. 12 R. 2. Pars secunda, N° 3. Rot. Claus. 29 E. 1. M. 10. Dorso, and the Letter of the Nobility to the Pope afferting

it. Ibid.

And this might be one Means, whereby the Laws of England in elder Times might in some Measure be introduced into Scotland.

But I rather come to the Times of King Edw. I. who was certainly the greatest refiner of the English Laws, and studiously endeavoured to enlarge the Dominions of of the Crown of England, so to extend and propagate the Laws of England into all Parts subject to his Dominion. This Prince, besides the ancient Claim he made to the Superiority of the Crown of England over that

## Ch. 10. Common Law of England.

that of Scotland, did for many Years actually enjoy that Superiority in its full Extent, and the Occasion and Progress thereof was thus, as it is related by Walsingham, and confonantly to him appears by the Records of those Times, viz. King Edw. I. having formerly received the Homage and Fealty of Alexander King of Scots, as appears Rot. Claus. 5 E. 1. M. 5. Dorso, was taken to be Superior Dominus Scotiæ Regni.

Alexander dying, left Margaret his only Daughter, and she dying without Issue, about 18 E. 1. there sell a Controversie touching the Succession of the Crown of Scotland, between the King of Norway claiming as Tenant by the Curtesy, Robert de Bruce descended from the younger Daughter of David King of Scots, and John de Baliol descended from the elder Daughter,

All the Competitors submit their Claim to the Decision of Edw. I. King of England as Superior Dominus Regni Scotiæ, who thereupon pronounced his Sentence for John de Baliol, and accordingly put him in Possession of the Kingdom, and required and re-

with divers other Competitors.

ceived his Homage.

The King of England, notwithstanding this, kept still the Possession, & Insignia of his Superiority; his Court of King's-Bench sate actually at Roxborough in Scotland, Mich. 20, 21 Edw. I. coram Rege, and upon Complaint of Injuries done by the said John King of Scots, now restor'd to his Kingdom, he summoned him often to answer in his Courts, Mich.

Digitized by
UNIVERSITY OF ILLINOIS AT
URBANA-CHAMPAIGN

201

Mich. 21, 22 Edw. I. Northumb. Scot. He was summoned by the Sheriff of Northumberland to answer to Walbest in the King's Court, Pas. 21 E. I. coram Rege, Rot. 34. He was in like manner summoned to answer John Mazune in the King's Bench for an Injury done to him, and Judgment given against the King of Scots, and that Judgment executed.

John King of Scots, being not contented with this Subjection, did in the 24th Year of King Edw. I. refign back his Homage to King Edward, and bade Defiance to him; wherefore King Edw. I. the same Year with a powerful Army entred Scotland, took the King of Scots Prisoner, and the greatest part of that Kingdom into his Possession, and appointed the Earl Warren to be Custos Regni, Cressingham to be his Treasurer, and Ormsby his Justice, and commanded his Judges of his Courts of England to issue the King of England's Writs into Scotland.

And when in the 27th Year of his Reign, the Pope, instigated by the French King, interpos'd in the Behalf of the King of Scotland, he and his Nobility resolutely denied the Pope's Intercession and Mediation.

Thus the Kingdom of Scotland continued in an actual Subjection to the Crown of England for many Years; for Rot. Claus. 33 E. I. Membr. 13. Dorso, and Rot. Claus. 34 E. I. Memb. 3. Dorso; several Provisions are made for the better ordering of the Government of Scotland.

What

http://www.hathitrust.org/access use#pd Generated on 2023-03-20 16:46 Public Domain / http://www.h

What Proceedings there were herein in the Time of Edw. II, and what Capitulations and Stipulations were afterwards made by King Edw. III. upon the Marriage of his Sifter by Robert de Bruce, touching the Relaxation of the Superius Dominium of Scotland, is not pertinent to what I aim at, which is, to shew how the English Laws that were in Use and Force in the Time of Edw. I. obtained to be of Force in Scotland,

which is but this, viz.

King Edward I. having thus obtained the actual Superiority of the Crown of Scotland, from the beginning of his Reign until his 20th Year, and then placing John de Baliol in that Kingdom, and yet continuing his Superiority thereof, and keeping his Courts of Justice, and exercising Dominion and Jurisdiction by his Officers and Minifters in the very Bowels of that Kingdom, and afterwards upon the Defection of this King John, in the 24th of Edw. I. taking the whole Kingdom into his actual Administration, and placing his own Judges and great Officers there, and commanding his Courts of King's-Bench (&c.) here, to Issue their Process thither, and continuing in the actual Administration of the Government of that Kingdom during Life: It is no Wonder that those Laws which obtained and were in Use in England, in and before the Time of this King, were in a great Measure translated thither; and possibly either by being enacted in that Kingdom, or at least for so long Time, put in Use and

and Practice there, many of the Laws in Use and Practice here in England were in his Time so rivetted and settled in that Kingdom, that 'tis no Wonder to find they were not shaken or altered by the liberal Concessions made afterwards by King Edw. III. upon the Marriage of his Sister; but that they remain Part of the Municipal

Laws of that Kingdom to this Day.

And that which renders it more evident, That this was one of the greatest Means of fixing and continuing the Laws of England in Scotland, is this, viz. This very King Edw. I. was not only a Martial and Victorious, but also a very Wise and Prudent Prince, and one that very well knew how to use a Victory, as well as obtain it: And therefore knew it was the best Means of keeping those Dominions he had powerfully obtain'd, by fubflituting and translating his own Laws into the Kingdom which he had thus Subdued. Thus he did upon his Conquest of Wales; and doubtless thus he did upon his Conquest of Scotland, and those Laws which we find there so nearly agreeing with the Laws of England used in his Time, especially the Statutes of Westm. 1. and Westm. 2. are the Monuments and Footsteps of his Wisdom and Prudence.

And, as thus he was a most Wise Prince, and to secure his Acquests, introduced many other Laws of his Native Kingdom into Scotland; so he very well knew the Laws of England were excellent Laws sitted for the due Administration of Justice to the Con-

stitution

flitution of the Governed, and fitted for the Preservation of the Peace of a Kingdom, and for the Security of a Government: And therefore he was ever solicitous, by all prudent and careful Means imaginable, to graft and plant the Laws of England in all Places where he might, having before hand used all possible Care and Industry for Rectifying and Resining the English Laws to their greatest Persection.

Again, It feems very evident, that the Design of King Edw. I. was by all Means possible to unite the Kingdom of Scotland (as he had done the Principality of Wales) to the Crown of England, so that thereby Britain might have been one entire Monarchy, including Scotland as well as Wales and England under the same Sceptre; and in order to the accomplishing thereof, there could not have been a better Means than to make the Interest of Scotland one with England, and to knit 'em as it were together in one Communion, which could never have been better done than by establishing one Common Law and Rule of Justice and Commerce among them; and therefore he did, as Opportunity and Convenience ferved, translate over to that Kingdom as many of our English Customs and Laws as within that Compass of Time he conveniently could.

And thus I have given an Essay of the Reasons and Means, how and why we find so many Laws in Scotland parallel to those in England, and holding so much of Congruity and Likeness to them.

And

And the Reason why we have but few of their Laws that correspond with ours of a later Date than Edw. I. or at least Edw. II. is because fince the Beginning of Edw. III. that Kingdom has been diffinct, and held little Communion with us till the Union of the two Crowns in the Person of King Fames I. (or rather the happy Union of the two Kingdoms under her present Majesty Queen Anne) and in fo great an Interval it must needs be, that by the Intervention and Succession of new Laws, much of what was fo ancient as the Times of Edw. I. and Edw. II. have received many Alterations: So that it is a great Evidence of the excellency of our English Laws, that there remain to this Day so many of them in Force in that Part of Great Britain continuing to bear Witness, that once that excellent Prince Edw. I. exercifed Dominion and Jurisdiction there.

And thus far of the Communion of the Laws of England to Scotland, and of the Means whereby it was effected; from whence it may appear, That as in Wales, Ireland and Normandy, fo also in Scotland, such Laws which in those Places have a Congruity or Similitude with the Laws of England, were derived from the Laws of England as from their Fountain and Original, and were not derived from any of those Places to England.

CHAP.

#### CHAP. XI.

Touching the Course of Descents in England.

A Mong the many Preferences that the Excel-Laws of England have above others, lency of I shall single out Two particular Titles which our Laws. are of Common Use, wherein their Preference is very visible, and the due Consideration of their Excellence therein, may give us a handsome Indication or Specimen of their Excellencies above other Laws in other Parts or Titles of the same also.

Those Titles, or Capitula Legum, which I shall single out for this Purpose, are these Two Intervals. If, The hereditary Transmission stances of Lands from Ancestor to Heir, and the Certainty thereof: And 2 dly, The Manner of Trial by Jury, which as it stands at this Day settled in England, together with the Circumstances and Appendixes thereof, is certainly the best Manner of Trial in the World; and I shall herein give an Account of the successive Progress of those Capitula Legis, and what Growth they have had in Succession of Time till they arriv'd to that State and Persection which they have now

First then touching Descents and here-First, of ditary Transmissions: It seems by the Laws Descents.

of

obtain'd.

of the Greeks and Romans, that the same Rule was held both in relation to Lands and Goods, where they were not otherwise disposed of by the Ancestor, which the Romans therefore called Succession ab intestato; but the Customs of particular Countries, and especially here in England, do put a great Difference, and direct a feveral Method in the Transmission of Goods or Chattels, and that of the Inheritances of Lands.

Now as to hereditary Transmissions or Successions, commonly called with us Defcents, I shall hold this Order in my Dif-

courfe, viz.

First, I shall give some short Account of the ancient Laws both of the fews, the Greeks, and the Romans, touching this Mat-

Secondly, I shall observe some Things wherein it may appear, how the particular Customs or Municipal Laws of other Countries varied from those Laws, and the Laws

here formerly used.

Thirdly, I shall give some Account of the Rules and Laws of Descents or hereditary Transmissions as they formerly stood, and as at this Day they stand in England, with the successive Alterations, that Process of Time, and the Wisdom of our Ancestors, and certain Customs grown up, tacitely, gradually, and fuccessively have made therein.

And First, touching the Laws of Succesfion, as well of Descent, of Inheritances of Lands, as also of Goods and Chartels, which

# Ch. 11. Common Law of England.

which among the Jews was the same in Among both.

Mr. Selden, in his Book De Successionibus apud Hæbræos, has given us an excellent Account, as well out of the holy Text as out of the Comments of the Rabins, or Jewish Lawyers, touching the same, which you may see at large in the 5th, 6th, 7th, 12th and 13th Chapters of that Book; and which; for so much thereof as concerns my present Purpose, I shall briefly comprise under the Eight following Heads, viz.

First, That in the Descending Line, the Descent or Succession was to all the Sons, only the eldest Son had a double Portion to any one of the rest, viz. If there were three Sons, the Estate was to be divided into four Parts, of which the eldest was to have two Fourth Parts, and the other two Sons were to have one Fourth Part each.

Secondly, If the Son died in his Father's Life-time, then the Grandson, and so in Infinitum, succeeded in the Portion of his Father, as if his Father had been in Possession of it, according to the Jus Representations.

now in Use here.

Thirdly, The Daughter did not succeed in the Inheritance of the Father as long as there were Sons, or any Descendants from Sons in being; but if any of the Sons died in the Life-time of his Father having Daughters, but without Sons, the Daughters succeeded in his Part as if he himself had been possessed.

D

Fourthly

Fourthly, And in case the Father lest only Daughters and no Sons, the Daughters equally succeeded to their Father as in Copartnership, without any Prelation or Preference of the eldest Daughter to two Parts, or a double Portion.

Fifthly, But if the Son had purchased an Inheritance and died without Issue, leaving a Father and Brothers, the Inheritance of such Son so dying did not descend to the Brothers, (unless in case of the next Brother's taking to Wife the Deceased's Widow to raise up Children to his deceased Brother) but in such case the Father inhe-

herited to fuch Son entirely.

Sixthly, But if the Father in that Case was dead, then it came to the Brothers, as it were as Heirs to the Father, in the same Manner as if the Father had been actually posses'd thereof; and therefore the Father's other Sons and their Descendants in Infinitum fucceeded; but yet especially, and without any double Portion to the eldeft, because tho' in Truth the Brothers succeeded as it were in Right of Representation from the Father, yet if the Father died before the Son, the Descent was de Facto immediately from the Brother deceased to the other Brothers, in which Case their Law gave not a double Portion, and in case the Father had no Sons or Descendants from them, then it descended to all the Sifters.

Seventhly, If the Son died without Issue, and his Father or any Descendants from him were extant, it went not to the Grand-

father

Ch. 11. Common Law of England.

tandis to the Proavus, Abavus, Atavus, &c. and their Descendants.

Eighthly, But the Inheritance of the Son never reforted to the Mother, or to any of her Ancestors, but both she and they were totally excluded from the Succession.

posses'd and had died, and so mutatis mu-

The double Portion therefore that was The doufus Primogenitura, never took Place but in ble Porthat Person that was the Primogenitus of him tion.
from whom the Inheritance immediately
descended, or him that represented him;
as if A. had two Sons, B. and C. and B. the
eldest had two Sons, D. and E. and then B.
died, whereas B. should have had a double
Portion, viz. Two Thirds in case he had
survived his Father; but now this double
Portion shall be equally divided between
D. and E. and D. shall not have Two Thirds
of the Two Thirds that descended from A.
to them. Vide Selden, ut supra.

Thus much of the Laws or Rules touch-

ing Descents among the Fews.

Among the Gracians, the Laws of Descents Descents in some Sort resemble those of the fews, among and in some Things they differed. Vide the Gracian Petit's Leges Attica, Cap. 1. Tit. 6. De Testa-

Generated on 2023-03-20 16:46 GMT / https://hdl.handle.net/2027/uiuc. Public Domain / http://www.hathitrust.org/access\_use#pd mentis & Hereditario Jure, where the Text of their Law runs thus, viz.

Omnes legitimi Filii Hæreditatem Paternam ex æquo inter se Hæriscunto, si quis intestatus moritur relictis Filiabus qui eas in Uxores ducunt bæredes sunto, si nullæ supersint, bi ab intestato hæreditatem cernunto: Et primo quidem Fratres defuncti Germani, & legitimi Fratrum Filii hæreditatem simul adeunto; si nulli Fratres aut Fratrum Filii supersint, iis geniti eadem Lege hæreditatem cernunto: Masculi autem iis geniti etiam si remotiori cognationis sint Gradu, præferuntor, si nulli supersint, Paterni proximi, ad sobrinorum usque Filios, Materni defuncti propingui simili Lege Hæreditatem adeunto; si e neutra cognatione supersint intra definitum Gradum proximus cognatus Paternus, addito Notho Nothave; Superstite Legitima Filia Nothus Hæreditatem Patris ne adito.

This Law is very obscure, but the Sense thereof seems to be briefly this, viz. That all the Sons equally shall inherit to the Father; but if he have no Sons, then the Husbands of the Daughters; and if he have no Children, then his Brothers and their Children; and if none, then his next Kindred on the Part of his Father, prefering the Males before the Females; and if none of the Father's Line, ad Sobrinorum usque Filios, then to descend to the Mother's Line. Vide Petit's Gloss thereon.

"But with all Respect to the Memory of this great good Man, I shall verture to

66 translate

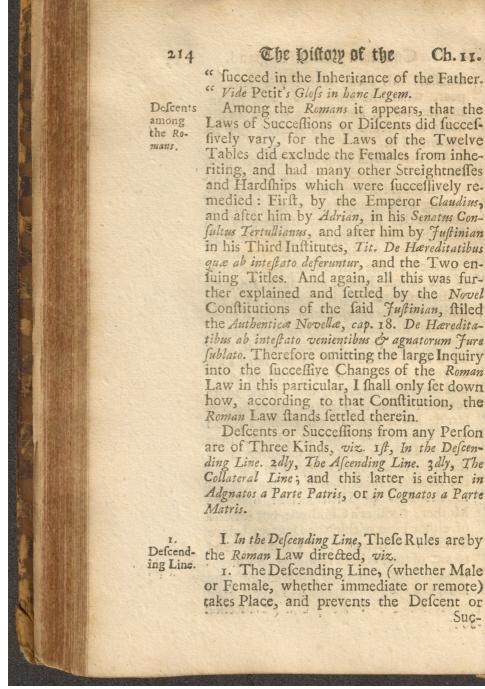
" translate this Law, whereby it will appear, what the true Sense and Meaning thereof is, and that it is not fo difficult or obscure as our Author has re-

opresented it.

All the lawful Sons shall inherit their Father's Estate, to be equally divided between them: If any Person dies Intestate, " leaving only Daughters, their Husbands " shall be his Heirs; but if none of the "Daughters be living, they (i. e. the Huf-" bands) shall not inherit to the Intestate: But then in the first Place, the Brothers of the whole Blood, and fuch Brothers " Children, shall inherit together, (i. e. the Children, jure representationis) and if there are no Brothers or Brothers Children living, then their Descendants (if they leave any) shall inherit by the same Law of equal Distribution; yet still the Males and their Descendants, tho' of the more remote Degree of Kindred, are to be preferr'd; but if none of the Father's Blood be living, of any nearer Degree than that of Father's Brother's Children, then the Inheritance shall descend to those of the Mother's Blood, having a like Regard to the Law of Distributions, and the Mother's Brother's Children; but if none of either Line within the Degrees before specified be living, then it shall descend to any of the Father's Blood tho' an illegitimate Son or Daughter; but if a legitimate Daughter were living, no Bastard shall

Generated on 2023-03-20 Public Domain / http:/

" fucceed



## Ch. 11. Common Law of England.

Succession Ascending or Collateral in infinitum.

2. The remote Descents of the Descending Line succeed in Stirpem, i. e. in that Right which his Parent should have had.

3. This Descent or Succession is equal in all the Daughters, all the Sons, and all the Sons and Daughters, without preferring the Male before the Female; so that if the common Ancestor had three Sons and three Daughters, each of them had a fixth Part; and if one of them had died in the Life of the Father, having three Sons and three Daughters, the fixth Part that belonged to that Party should have been divided equally between his or her fix Children, and so in infinitum in the Descending Line.

II. In the Ascending Line, there are these two Rules, viz.

1. If the Son dies without Issue, or any ing Line. descending from him, having a Father and a Mother living, both of them shall equally succeed to the Son, and prevent all others of the Collateral Line except Brothers and Sisters, and if only a Father, or only a Mother, he or she shall succeed alone.

2. But if the Deceased leaves a Father and a Mother, with a Brother and a Sister, ex utrisque Parentibus conjuncti, they all Four shall equally succeed to the Son by equal Parts without Preference of the Males.

III. In the Collateral Line, (i. e. where the Person dies without Father or Mother, Collateral P 4 Son Line.

2. Afcend-

215

Son or Daughter, or any descending from them in the Right Line) the Rules are these, viz.

r. The Brothers and Sisters, ex utrisque Parentibus conjuncti, and the immediate Children of them, shall succeed equally without Preference of either Sex, and the Children from them shall succeed in stirpes; as if there be a Brother and Sister, and the Sister dies in the Life of the Descendant leaving one or more Children, all such Children shall succeed in the Moiety that should have come to their deceased Mother, had she survived.

2. But if there be no Brothers or Sisters, ex utrisque Parentibus conjuncti, nor any of their immediate Children, then the Brothers and Sisters of the half Blood and their immediate Children shall succeed in Stirpes to the Deceased without any Prerogative to the

Male.

3. But if there be no Brothers or Sisters of the whole or half Blood, nor any of their immediate Children (for the Grand-children are not provided for by the Law) then the next Kindred are called to the Inheritance.

(But by our Author's Leave, I think the Grandchildren are impliedly provided for, as they succeed their Father or Mother Jure representa-

tionis.)

4. And if the next Kindred be in an equal Degree, whether on the Part of the Father as Adgnati, or on the Part of the Mother as Cognati, then they are equally called to the

Ch. 11. Common Law of England.

217 the Inheritance, and succeeded in Capita,

and not in Stirpes.

Thus far of the settled Laws of the Fews, Greeks, and Romans, but the Particular or Municipal Laws and Customs of almost every Country derogate from those Laws, and direct Successions in a much different Way. For Instance.

By the Customs of Lombardy, according Laws of to which the Rules of the Feuds, both in Lombardy. their Descents and in other Things, are much directed; their Decents are in a much

different Manner, viz.

Leges Feudarum, Lib. 1. Tit. 1. If a Feud Of Feuds. be granted to one Brother who dies without Issue, it descends not to his other Brother unless it be specially provided for in the first Infeudation: If the Donee dies, having Issue Sons and Daughters, it descends only to the Sons; whereas by the Roman Law it descends to both: The Brother succeeds not to the Brother unless specially provided for, & Ibid. Tit. 50. The Ascendants succeed not, but only the Descendants, neither does a Daughter succeed nisi ex Patto, vel nisi sit Feodum Fæmineum.

If we come nearer Home to the Laws of Descents Normandy, Lands there are of Two Kinds, in Norviz. Partible, and not Partible; the Lands mandy, that are partible, are Valvasories, Burgages, and fuch like, which are much of the Nature of our Socage Lands; these descend to all the Sons, or to all the Daughters: Lands not partible, are Fiefs and Dignities,

they

they descend to the eldest Son, and not to all the Sons; but if there be no Sons, then to all the Daughters, and become partible.

The Rules and Directions of their De-

fcents are as follow, viz.

I. For want of Sons or Nephews, it descends to the Daughters; if there be no Sons or Daughters, or Descendants from them, it goes to Brothers, and for want of Brothers, to Sifters, (observing as before the Difference between Lands partible and not partible) and accordingly the Descent runs to the Posterity of Brothers to the feventh Degree; and if there be no Brothers nor Sifters, nor any Descendants from them within the feventh Degree, it descends to the Father, and if the Father be dead, then to the Uncles and Aunts and their Posterity, (as above is said in the Case of Brothers and Sifters) and if there be none, then to the Grandfather.

So that according to their Law, the Father is postponed to the Brother and Sister, and their Issues, but is preferred before the Uncle: Tho' according to the Jewish Law, the Father is preferred before the Brother; by the Roman Law, he succeeds together equally with the Brother; but by the English Law, the Father cannot take from his Son by an immediate Descent, but may take as Heir to his Brother, who was Heir to his Son by

Collateral Descent.

2. If

## Ch. 11. Common Law of England.

2. If Lands descended from the Part of the Father, they could never resort by a Descent to the Line of the Mother; but in case of Purchases by the Son who died without Issue, for want of Heirs of the Part of the Father, it descended to the Heirs of the Part of the Mother according to the Law of England.

3 The Son of the eldest Son dying in the Life of the Father, is preferred before a younger Son surviving his Father as the Law stands here now settled, tho it had

10me Interruption, 4 Johannis.

4. On Equality of Degrees in Collateral Descents, the Male Line is preferred before

the Female.

5. Altho' by the Civil Law, Fratres ex utroque Parente conjuncti præferuntur Fratribus consanguineis tantum vel uterinis; yet it should seem by the Coutumier of Normandy, Fratres consanguinei ei ex eodem Patre sed diversa Matre, shall take by Descent together with the Brothers, ex utroque conjuncti, upon the Death of any such Brothers. But Quære hereof, for this seems a Mistake; for, as I take it, the half Blood hinders the Descent between Brothers and Sisters by their Laws as well as ours.

6. Leprofy was amongst them an Impediment of Succession, but then it seems it ought to be first solemnly adjudged so by the Sentence of the Church.

Upon all this, and much more that might be observed upon the Customs of several Countries, it appears, That the Rules of

Suc-

219

Successions, or hereditary Transmissions. have been various in feveral Countries according to their various Laws, Customs, and Ulages.

And now, after this brief Survey of the Laws and Customs of other Countries, I come to the Laws and Usages of England in relation to Descents, and the Growth that those Customs successively have had, and whereunto they are now arrived.

Descents in England.

First, Touching hereditary Successions: It feems, that according to the ancient British Laws, the eldest Son inherited their Earldoms and Baronies; for they had great Dignities and Jurisdictions annex'd to them, and were in Nature of Principalities, but that their ordinary Freeholds descended to all their Sons; and this Custom they carried with them into Wales whither they were driven. This appears by Statutum Wallie, 12 E. 1. and which runs thus, viz.

Among the Wellh. Statute 12 Ed. 1.

> Aliter usitatum est in Wallia quam in Anglia quoad Successionem bæreditatis; eo quod bæreditas. partibilis est inter hæredes Masculos, & a tempore cujus non extiterit Memoria partibilis extitit. Dominus Rex non vult quod consuetudo illa abrogetur; sed quod bæreditates remaneant partibiles inter consimiles bæredes sicut esse Consueverunt; & fiat partitio illius sicut fieri consuevit. excepto quod Bastardi non habeant de cætero hareditates & etiam quod non habeant purpartes, oum legitimis nec sine legitimis.

> > Where-

Whereupon Three Things are observa-1st, That at this Time the hereditary Succession of the eldest Son was then known to be the common and ulual Law in England. 2dly, That the Succession of all the Sons was the ancient customary Law among the British in Wales, which by this Statute was continued to them. 3dly, That before this Time, Bastards were admitted to inherit in Wales as well as the Legitimate Children, which Custom is thereby abrogated; and although we have but few Evidences touching the British Laws before their Expulsion hence into Wales, yet this Ulage in Wales feems sufficiently to evidence this to have been the ancient British Law.

Secondly, As to the Times of the Saxons and Danes, their Laws collected by Brompton and Mr. Lambart, speak not much concerning the Course of Descents; yet it seems that commonly Descents of their ordinary Lands at least, except Baronies and Royal Inheritances, descended also to all the Sons: For amongst the Laws of King Canutus, in Mr. Lambard is this Law, viz. N° 68. Sive quis incuria sive Morte repentina fuerit intestate mortuus, Dominus tamen nullam rerum suarum Partem (præter eam quæ jure debetur Hereoti nomine) Sibi assumito. Verum eas Judicio suo Uxori, Liberis & cognatione proximis juste (pro suo cuique jure) distribuito.

Upon which Law, we may observe these

five Things, viz.

1st, That

ift, That the Wife had a Share, as well of the Lands for her Dower, as of the Goods.

2dly, That in reference to hereditary Successions, there then feem'd to be little Difference between Lands and Goods, for this Law makes no Distinction.

3dly, That there was a kind of settled Right of Succession, with reference to Proximity and Remoteness of Blood, or Kin, Et

cognatione proximis pro suo cuique jure.

4thly, That in reference to Children, they all feem'd to succeed alike, without any Distinction between Males and Females.

5thly, That yet the Ancestor might dispose of by his Will as well Lands as Goods, which Usage seems to have obtained here unto the Time of Hen. II. as will appear hereafter. Vide Glanville.

Thirdly, It feems that, until the Conquest, the Descent of Lands was at least to all the Sons alike, and for ought appears to all the Daughters also, and that there was no Difference in the hereditary Transmission of Lands and Goods, at least in reference to the Children: This appears by the Laws of King Edward the Confessor, consirm'd by King William I. and recited in Mr. Lambart, Folio 167. as also by Mr. Selden in his Notes upon Eadmerus, viz. Lege 36 Tit. De Intestatorum Bonis; Pag. 184. Si quis intestatus obierit Liberi ejus Hæreditatem æqualiter divident.

But this equal Division of Inheritances among all the Children was found to be

very inconvenient: For,

Ist, It

Ch. 11.

http://www.hathitrust.org/access\_use#pd Generated on 2023-03-20 Public Domain / http:/ If, It weakened the Strength of the Kingdom, for by frequent parcelling and fubdividing of Inheritances, in Process of Time they became so divided and crumbled, that there were few Persons of able Estates left to undergo publick Charges and Offices.

and Families were broken; and the younger Sons, which had they not had those little Parcels of Land to apply themselves to, would have betaken themselves to Trades, or to Civil or Military, or Ecclesiastical Employments, neglecting those Opportunities, wholly apply'd themselves to those small Divisions of Lands, whereby they neglected the Opportunities of greater Advantage of enriching themselves and the Kingdom.

And therefore King William I. having by his Accession to the Crown gotten into his Hands the Possessions and Demeasins of the Crown, and also very many and great Possessions of those that oppos'd him, or adhered to Harold, disposed of those Lands or great Part of them to his Countrymen, and others that adhered to him, and reserved certain honorary Tenures, either by Baronage, or in Knights-Service or Grand Serjeancy, for the Desence of the Kingdom, and possibly also, even at the Desire of many of the Owners, changed their former Tenures into Knights-Service, which Introduction of new Tenures was neverthe-

less

less not done without Consent of Parliament: as appears by the additional Laws before mentioned, that King William made by Advice of Parliament, mentioned by Mr. Selden in his Notes on Eadmerus, Page 191. amongst which this was one, viz.

Statuimus etiam & firmiter præcipimus ut omnes Comites Barones Milites & Servientes & universi liberi Homines totius Regni nostri habeant & teneant se semper in Armis & in Equis ut decet & oportet, & quod fint semper prompti & bene parati ad Servitium suum integrum nobis explendendum & peragendum, cum semper opus fuerit secundum quod nobis de Feodis debent & tenentur Tenementis suis de Jure facere & sicut illis statuimus per Commune Concilium totius Regni nostri, Et illis dedimus & concessimus in Feodo Ture bæreditario.

Whereby it appears, that there were Two Kinds of Military Provisions; one that was fet upon all Freeholds by common Confent of Parliament, and which was usually called Affifa Armorum; and another that was Conventional and by Tenure, upon the Infeudation of the Tenant, and which was usually called Knights Service, and sometimes Royal, sometimes Foreign Service, and 10metimes Servitium Lorica.

And hence it came to pass, that not only by the Customs of Normandy, but also according to the Customs of other Countries; those honorary Fees, or Infeudations, became descendible to the Eldest, and not to

all

all the Males. And hence also it is, that in Kent, where the Custom of all the Males taking by Descent generally prevails, and that pretend a Concession of all their Customs by the Conqueror, to obtain a Submission to his Government, according to that Romantick Story of their Moving Wood: But even in Kent it self, those ancient Tenements or Fees that are there held anciently by Knights Service, are descendible to the Eldest Son, as Mr. Lambard has observed to my Hands in his Perambulation, Page 533, 553. out of 9 H. 3. Fitz. Pre-Scription 63. 26 H. 8. 5. and the Statute of 21 H. 8. cap. 2. And yet even in Kent, it Gavelkind Lands eschear, or come to the Crown by Attainder or Dissolution of Monasteries, and be granted to be held by Knights Service, or per Baroniam, the Customary Descent is not changed, neither can it be but by Act of Parliament, for it is a Custom fix'd to the Land.

But those honorary Infeudations made in ancient Times, especially shortly after the Conquest, did filently and suddenly assume the Rule of Descents to the Eldest, and accordingly held it; and fo altho' poffibly there were no Acts of Parliament of those Elder Times, at least none that are now known of, for altering the ancient Course of Descents from all the Sons to the Eldest, yet the Use of the Neighbouring Country might introduce the same Usage

here as to those honorary Possessions.

And

And because those honorary Infeudations were many, and scattered almost through all the Kingdom, in a little Time they introduced a Parity in the Succession of Lands of other Tenures, as Socages, Valvalories, &c. So that without Question, by little and little, almost generally in all Counties of England (except Kent, who were most tenacious of their old Customs in which they gloried, and fome particular Feuds and Places where a contrary Ufage prevailed), the generalty of Descents or Successions, by little and little, as well of Socage Lands as Knights Service, went to the eldest Son, according to the Declaration of King Edw. I. in the Statute of Wales above-mentioned, as will more fully appear by what follows.

In the Time of Hen. I. as we find by his 70th Law, it seems that the whole Land did not descend to the eldest Son, but begun to look a little that Way, viz. Primum Patris Feudum, primogenitus Filius habeat. And as to Collateral Descents, that Law determins thus: Si quis sine Liberis decesserit Pater aut Mater ejus in hæreditatem succedat vel Frater vel Soror si Pater & Mater desint, si nec hos, habeat Soror Patris vel Matris, & deinceps in Quintum geniculum; qui cum propinquiores in parentela sint hæreditario jure succedant; & dum Virilis sexus extiterit & hæreditas ab inde

fit, Fæminea non hæreditetur.

Vide Ante. Chap 7. and Lambard, ut Supra.

By

By this Law it feems to appear;

1. The eldest Son, tho' he had Jus primogenituræ, the principal Fee of his Father's Land, yet he had not all the Land.

2. That for want of Children, the Father or Mother inherited before the Brother or

Sifter.

3. That for want of Children, and Father, Mother, Brother, and Sifter, the Land descended to the Uncles and Aunts to the fifth Generation.

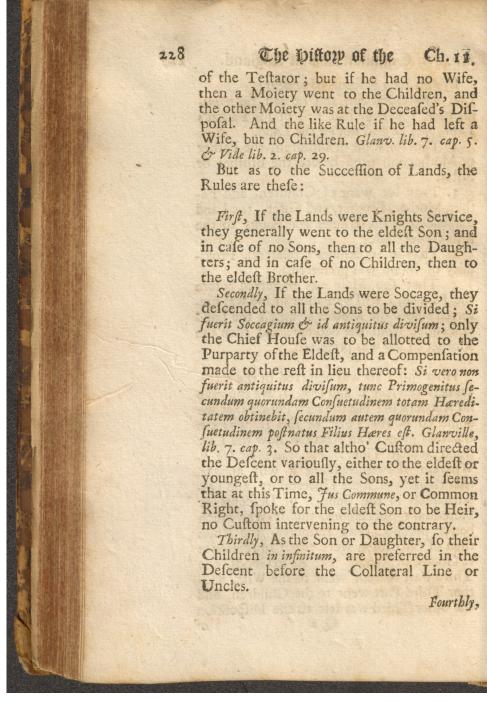
4. That in Successions Collateral, Proxi-

mity of Blood was preferred.

5. That the Male was preferred before the Female, i. e. The Father's Line was preferred before the Mother's, unless the Land descended from the Mother, and then the Mother's Line was preferred.

How this Law was observed in the Interval between Hen. I. and Hen. II. we can give no Account of; but the next Period that we come to is, the Time of Hen. II. wherein Glanville gives us an Account how the Law stood at that Time: Vide Glanville, Lib. 7. Wherein notwithstanding it will appear, that there was fome Uncertainty and Unfettledness in the Business of Descents or Hereditary Successions, tho' it was much better polished than formerly, the Rules then of Succession were either in reference to Goods, or Lands. 1st, As to Goods, one Third Part thereof went to the Wife, another Third Part went to the Children, and the other Third was left to the Disposition

Q 2 of



Fifthly, A Bastard could not inherit, Ibid. cap. 13, or 17. And altho' by the Canon or Civil Law, if A. have a Son born of B. before Marriage, and after A. marries B. this Son shall be legitimate and heritable; yet according to the Laws of England then, and ever fince used, he was not heritable,

Glanvil. lib. 7. cap. 15.

Sixtbly, In case the Purchaser died without Issue, the Land descended to the Brothers; and for want of Brothers, to the Sifters; and for want of them, to the Children of the Brothers or Sisters; and for want of them, to the Uncles; and so onward according to the Rules of Descents at this Day; and the Father or Mother were not to inherit to the Son, but the Brothers or Uncles, and their Children. Ibid. cap. I. \$ 4.

And it feems, That in all Things elfe, the Rules of Descents in reference to the Collateral Line were much the same as now; as namely, That if Lands descended of the Part of the Father, it should not resort to the Part of the Mother, or è converso; but in the Case of Purchasers, for want of Heirs

Heirs of the Part of the Father, it reforted to the Line of the Mother, and the nearer and more worthy of Blood were preferred: So that if there were any of the Part of the Father, tho' never so far distant, it hindred the Descent to the Line of the Mother, though much nearer.

But in those Times it seems there were two Impediments of Descents or hereditary Successions which do not now obtain, viz.

First, Leprofy, if so adjudged by Sentence of the Church: This indeed I find not in Glanville; but I find it pleaded and allowed in the Time of King John, and thereupon the Land was adjudged from the Leprous Brother to the Sister. Pasch. 4 Johannis.

Secondly, There was another Curiofity in Law, and it was wonderful to fee how much and how long it prevail'd; for we find it in Use in Glanville, who wrote Temp. Hen. II. in Bracton Temp. Hen. III. in Fleta Temp. Edw. I. and in the broken Year of 12 E. 1. Fitzh. Avowry 235. Nemo potest esse Tenens & Dominus, & Homagium repellit Perquisitum: And therefore if there had been three Brothers, and the eldest Brother had enfeoff'd the second, reserving Homage, and had received Homage, and then the fecond had died without Issue, the Land should have descended to the youngest Brother and not to the eldest Brother, Quia Homagium repellit perquifitum, as 'tis here said, for he could not pay Homage to himfelf. Vide

But at this Day the Law is altered, and fo it has been for ought I can find ever fince 13 E. 1. Indeed, it is antiquated rather than altered, and the Fancy upon which it was grounded has appear'd trivial; for if the eldest Son enfeoff the second, referving Homage, and that Homage paid, and then the fecond Son dies without Issue, it will descend to the Eldest as Heir, and the Seigniory is extinct. It might indeed have had some Colour of Reason to have examined, whether he might not have waved the Descent, in case his Services had been more beneficial than the Land: But there could be little Reason from thence to exclude him from the Succession. I shall mention no more of this Impediment, nor of that of Leprofy, for that they both are vanished and antiquated long since; and, as the Law now is, neither of thele are any Impediment of Descents.

And now passing over the Time of King fohn and Richard I. because I find nothing of Moment therein on this Head, unless the Usurpation of King fohn upon his eldest Brother's Son, which he would fain have justified, by introducing a Law of prefering the younger Son before the Nephew descended from the elder Brother: But this Pretension could no way justifie his Usurpation, as has been already shewn in the Time

of Hen. II.

Q 4

Next,

Next, I come to the Time of Hen. III. in whose Time the Tractate of Bracton was written, and thereby in Lib. 2. cap. 30, & 31. and Lib. 5. cap. . it appears, That there is so little Variance as to Point of Defcents between the Law as it was taken when Bracton wrote, and the Law as afterwards taken in Edw. I.'s Time, when Britton and Fleta wrote, that there is very little Difference between them, as may eafily appear by comparing Bracton ubi supra, & Fleta, Lib. 5. cap. 9. Lib. 6. cap. 1, 2. that the latter feem to be only Transcripts or Abstracts of the former. Wherefore I shall set down the Substance of what both say, and thereby it will appear, that the Rules of Descents in Hen. III. and Edw. I.'s Time were very much one.

First, At this Time the Law seems to be unquestionably settled, that the eldest Son was of Common Right Heir, not only in Cases of Knight Service Lands, but also of Socage Lands, (unless there were a special Custom to the contrary, as in Kent and some other Places) and so that Point of the Common Law was fully settled.

Secondly, That all the Descendants in infinitum, from any Person that had been Heir, if living, were inheritable fure representations; as, the Descendants of the Son, of the Brother, of the Uncle, &c. And also,

Thirdly, That the eldest Son dying in the Life-time of the Father, his Son or Issue

was

was to have the Preference as Heir to the Father before the younger Brother, and so the Doubt in Glanville's Time was settled, Glanvil. Lib. 7. cap. 3. Cum quis autem moriatur babens Filium postnatum, & ex primogenito Filio præmortuo Nepotem, Magna quidem furis dubitatio solet esse uter illorum preferendus sit alii in illa Successione, scilicet, utrum Filius aut Nepos?

Fourthly, The Father, or Grandfather, could not by Law inherit immediately to

the Son.

Fifibly, Leprofy, Though it were an Exception to a Plaintiff, because he ought not to converse in the Courts of Law, as Bracton, Lib. 5. cap. 20. yet we no where find it to be an Impediment of a Descent.

So that upon the whole Matter, for any Thing I can observe in them, the Rules of Descents then stood settled in all Points as they are at this Day, except some few Matters (which yet soon after settled as they now stand), viz.

First, That Impediment or Hindrance of a Descent from him that did Homage to him that received it, seems to have been yet in Use at least till 12 E. 1. and in Fleta's Time, for he puts the Case and admits it.

Secondly, Whereas both Bracton and Fleta agree, that half Blood to him that is a Purchaser is an Impediment of a Descent; yet in the Case of a Descent from the Common Ancestor, half Blood is no Impediment

ment.

ment. As for Instance; A. has Issue B. a Son and C. a Daughter by one Venter, and D. a Son by another Venter: If B. purchases in Fee and dies without Issue, it shall descend to the Sister, and not to the Brother of the half Blood; but if the Land had descended from A. to B. and he had entred and died without Issue, it was a Doubt in Bracton and Britton's Time, whether it should go to the younger Son, or to the Daughter? But the Law is since settled, that in both Cases it descends to the Daughter, Et seisma facit Stipitem & primum Gradum. Et possesso Fratris de Feodo simplici facit Sororem esse baredem.

Thus upon the whole it feems, That abating those small and inconsiderable Variances, the States and Rules of Descents as they stood in the Time of Hen. III. or at least in the Time of Edw. I. were reduced to their full Complement and Perfection, and vary nothing considerably from what they are at this Day, and have continued

ever fince that Time.

I shall therefore set down the State and Rule of Descents in Fee-Simple as it stands at this Day, without meddling with particular Limitations of Entails of Estates, which vary the Course of Descents in some Cases from the Common Rules of Descents or hereditary Successions; and herein we shall see what the Law has been and continued touching the same ever since Bracton's Time, who wrote in the Time of Hen. Ill. now above 400 Years since, and by that we shall

## Ch. 11. Common Law of England.

shall see what Alterations the Succession of

Time has made therein.

And now to give a short Scheme of the Rules of Descents, or hereditary Successions, of the Lands of Subjects as the Law stands at this Day, and has stood for above four hundred Years past, viz.

All possible hereditary Successions may be distinguished into these 3 Kinds, viz. either,

1st, In the Descending Line, as from Father to Son or Daughter, Nephew or Niece, i.e. Grandson or Grand-daughter. Or,

2dly, In the Collateral Line, as from Brother to Brother or Sister, and so to Brother

and Sisters Children. Or,

adly, In an Ascending Line, either direct, as from Son to Father or Grandfather, (which is not admitted by the Law of England) or in the transversal Line, as to the Uncle or Aunt, Great-Uncle or Great-Aunt, &c. And because this Line is again divided into the Line of the Father, or the Line of the Mother, this transverse ascending Succession is either in the Line of the Father, Grandfather, &c. on the Blood of the Father; or in the Line of the Mother, Grandmother, &c. on the Blood of the Mother: The former are called Adgnati, the latter Cognati: I shall therefore set down a Scheme of Pedigrees as high as Great-Grandfather and Great-GrandmothersGrandsires, and aslow as Great-Gandchild; which nevertheless will be applicable to more remote Successions with a little Variation, and will explain the whole Nature of Descents or hereditary Successions. The

Digitized by
UNIVERSITY OF ILLINOIS AT
URBANA-CHAMPAIGN

235

|             | 236  | 5   |  |  | The  | Diff   | osh o  | e the  | Ch. 11,  |
|-------------|--|---|--|--|--|--|--|--|--|
| Line.       | Trienvia, or Great-Grandmothers Great-Grandmother. | Atavia, or Great-Grandmothers Grandmother.                            | Abavia, or Great-Grandmothers Mother.                        | Promasertera Magna.<br>Great-Great-Aunt.   | Matertera Magna.   | Matertera.<br>Mothers Silter.  | Confobrings. A Mot Sisters Son.  Confobring. A Mot Sisters Daughter.   |  | A Mothers  |
| he MATERNAL |  |   |  | Programmalus. Gr. Great-Uncle.   | Avancalus Magnus.  <br>Great-Uncle.  | Avunculus.<br>Mothers Brother.   | Confobrinus. A Mothers Brother's Son.  Confobrina. A Mothers Brother's Daughter.   |  |  |
|             |  |   |  | - 1  | Avia, or Grandmother.  | Mater, or MOTHER.  | rimus;   | Neptis, or Grandaughter,   |  |
|             | Great-Grandfather.                                 | s Grandfather.  | er's Father.   | Gr. Grandfather.   | Avus, or Grandfather.  | Pater, or FATHER.  | Filius P   | Nepus, or<br>Grandson.   | ts from all these gree, if Male, is emale, Proneptiv.  |
| C PATERNAL  | oreat-Grandfather's (                              | Great-Grandfather's   | or Great-Grandfath   |  | Patrum Magnus.<br>Great-Uncle.   | Patruus, or Uncle.   | Frater, his Brother.   | Nepos. Neptis.<br>Nephew. Nicce.   | Note, The Descendants from all these Six in the next Degree, if Male, is called Pronepos, if Female, Proneptis.  i. e. Great. Grandson, or Great. Gransant adaughter.  |
| Į,          | Tritavus, or G                                     | Atavus, or  | Abavus,  | Proamita Magna.<br>Great Great-Aunt.   | Amita Magna.<br>Great-Aunt.  | Amita, or Aunt.  | Soror, his Siffer.   | Nepos. Neptus.   | Na   |
|             | The MATERNAL Line.                                 | The PATERNAL Line. Tritowia, or Great-Grandmothers Great-Grandmother. | The PATERNAL Line. or Great-Grandfather's Great-Grandfather. | The PATERNAL Line. or Great-Grandfather's Great-Grandfather. w, or Great-Grandfather's Grandfather.  Alavia, or Great-Grandfather's Father.  Abavia, or Great-Grandfather's Father.  Abavia, or Great-Grandmothers Mother. | The PATERNAL Line.  or Great-Grandfather's Great-Grandfather.  Atavia, or Great-Grandfather's Grandfather.  Atavia, or Great-Grandfather's Father.  Abavia, or Great-Grandmothers Mother.  Abavia, or Great-Grandmothers Mother.  Abavia, or Great-Grandmothers Mother.  Anavia.  Proavia.  Great-Grandmothers Grandfather.  Gr. Great-Grandmother.  Great-Great-Uncle.  Great-Great-Aunt. | The MATERNAL Line.  Great-Grandfather's Great-Grandfather.  Great-Grandfather's Grandfather.  Great-Grandfather's Father.  Proportion Magnus.  Programme Magnus.  Programme Magnus.  Programme Magnus.  Programme Magnus.  Programme Magnus.  Programme Magnus.  Great-Great-Uncle.  Great-Great-Uncle.  Great-Great-Uncle.  Great-Great-Uncle.  Great-Great-Uncle.  Great-Great-Uncle.  Great-Great-Uncle.  Great-Great-Uncle.  Great-Great-Uncle.  Great-Magnus.  Great-Great-Uncle.  Great-Great-Uncle. | The MATERNAL Line.  Great-Grandfather's Great-Grandfather.  Great-Grandfather's Great-Grandfather.  Great-Grandfather's Great-Grandfather.  Great-Grandfather's Father.  Abavia, or Great-Grandmothers Grandmother.  Propatrum Magnus.  Propatrum Magnus.  Propavis. or Great-Grandmother.  Avia, or Great-Grandmother.  Propavis.  Great-Grandmother.  Great-Grandmother.  Great-Grandmother.  Grandfather.  Grandfather.  Grandfather.  Grandfather.  Grandfather.  Grandfather.  Grandfather.  Grandfather.  Great-Uncle.  Great-Uncle.  FATHER.  Mothers Brother.  Mothers Silter. | The MATE RNAL Line.  reat-Grandfather's Great-Grandfather.  Great-Grandfather's Great-Grandfather.  Great-Grandfather's Great-Grandfather.  Great-Grandfather's Great-Grandfather.  Absvis., or Great-Grandmother Grandmother.  Proparruss Magnus.  Patruss Magnus.  Patruss Magnus.  Patruss Magnus.  Patruss or Great-Grandmother.  Patruss Magnus.  Patruss Magnus.  Great-Great-Uncle.  Great-Great-Uncle.  Great-Great-Uncle.  Great-Great-Uncle.  Great-Grandfather.  Great-Grandmother.  Great- | The MATERNAL Line.  The MATERNAL Line.  Great-Grandfather's Great-Grandmothers Great-Grandmother.  Great-Grandfather's Grandfather.  Great-Grandmother Great-Grandmother.  Abavia, or Great-Grandmother.  Proparium Magnus.  Proparium Magnus.  Parium Magnus.  Parium Magnus.  Great-Grandmother Great-Grandmother.  Grandmother.  Great-Grandmother.  Gr |

This Pedigree, with its Application, will give a plain Account of all Hereditary Successions under their several Cases and Limitations, as will appear by the following Rules, taking our Mark or Epocha from the FATHER and MOTHER.

But first, I shall premise certain general Rules, which will direct us much in the Course of Descents as they stand here in

England: (Viz)

First, In Descents, the Law prefers the i. Rule.

worthiest of Blood: As,

rft, In all Descents immediate, the Male is preferred before the Female, whether in Successions Descending, Ascending, or Collateral: Therefore in Descents, the Son inherits and excludes the Daughter, the Brother is preferred before the Sifter, the

Uncle before the Aunt.

2dly, In all Descents immediate, the Descendants from Males are to be preferred before the Descendants from Females: And hence it is, That the Daughter of the eldest Son is preferred in Descents from the Father before the Son of the younger Son; and the Daughter of the eldest Brother, or Uncle, is preferred before the Son of the younger; and the Uncle, nay, the Great-Uncle, i. e. the Grandfather's Brother, shall inherit before the Uncle of the Mothers Side.

Secondly, In Descents, the next of Blood 2. Rule. is preferred before the more remote, tho' equally or more worthy. And hence it is,

If. The

if, The Sister of the whole Blood is preferred in Descents before the Brother of the half Blood, because she is more strictly joined to the Brother of the whole Blood (viz. by Father and by Mother) than the half Brother, though otherwise he is the more worthy.

2dly, Because the Son or Daughter being nearer than the Brother, and the Brother or Sister than the Uncle, the Son or Daughter shall inherit before the Brother or Sister,

and they before the Uncle.

adly, That yet the Father or Grandfather, or Mother or Grandmother, in a direct ascending Line, shall never succeed immediately the Son or Grandchild; but the Father's Brother (or Sifters) shall be preferred before the Father himself; and the Grandfather's Brother (or Sifters) before the Grandfather: And yet upon a strict Account, the Father is nearer of Blood to the Son than the Uncle, yea than the Brother; for the Brother is therefore of the Blood of the Brother, because both derive from the same Parent, the Common Fountain of both their Blood. And therefore the Father at this Day is preferred in the Administration of the Goods before the Son's Brother of the whole Blood, and a Remainder limited Proximo de Sanguine of the Son shall vest in the Father before it shall vest in the Uncle. Vide Littleton, Lib. 1. fo. 8, 10.

3. Rule.

Thirdly, That all the Descendants from such a Person as by the Laws of England might

# Ch. 11. Common Law of England.

might have been Heir to another, hold the fame Right by Representation as that Common Root from whence they are derived;

and therefore,

of Worthiness and Proximity of Blood, as their Root that might have been Heir was, in case he had been living: And hence it is, that the Son or Grandchild, whether Son or Daughter of the eldest Son, succeeds before the younger Son; and the Son or Grandchild of the eldest Brother, before the youngest Brother; and so through all the Degrees of Succession, by the Right of Representation, the Right of Proximity is transerred from the Root to the Branches, and gives them the same Presence as the next and worthiest of Blood.

2dly, This Right transferred by Reprefentation is infinite and unlimited in the Degrees of those that descend from the Represented; for Filins the Son, the Nepos the Grandson, the Abnepos the Great-Grandson, and so in infinitum enjoy the same Privilege of Representation as those from whom they derive their Pedigree have, whether it be in Descents Lineal, or Transversal; and therefore the Great-Grandchild of the eldelt Brother, whether it be Son or Daughter, shall be preferred before the younger Brother, because tho' the Female be less worthy than the Male, yet she stands in Right of Representation of the eldest Brother, who was more worthy than the younger. And upon this Account it is,

3 dly, That

239

and the eldest dies in the Life of the Father, leaving six Daughters, and then the Father dies; the youngest Daughter shall have an equal Share with the other six Daughters, because they stand in Representation and Stead of their Mother, who could have had but a Moiety.

4. Rule.

Fourthly, That by the Law of England, without a special Custom to the contrary; the eldest Son, or Brother, or Uncle, excludes the younger; and the Males in an equal Degree do not all inherit: But all the Daughters, whether by the same or divers Venters, do inherit together to the Father, and all the Sisters by the same Venter do inherit to the Brother.

s. Rule.

Fifthly, That the last actual Selfin in any Ancestor, makes him, as it were, the Root of the Descent equally to many Intents as if he had been a Purchaser; and therefore he that cannot, according to the Rules of Descents, derive his Succession from him that was last actually seized, tho' he might have derived it from some precedent Ancestor, shall not inherit. And hence it is, That where Lands descend to the eldest Son from the Father, and the Son enters and dies without Issue, his Sister of the whole Blood shall inherit as Heir to the Brother, and not the younger Son of the half Blood, because he cannot be Heir to the Brother of the half Blood; but if the eldeft Son had furvived

desch

Ch. ir. Common Law of England.

vived the Father and died before Entry, the youngest Son should inherit as Heir to the Father, and not the Sister, because he is Heir to the Father that was last actually seized. And hence it is, That tho' the Uncle is preferred before the Father in Descents to the Son; yet if the Uncle enter after the Death of the Son and die without Issue, the Father shall inherit to the Uncle, quia Seisina facit Stipitem.

to any Land, must be of the Blood to him that first purchased it: And this is the Reason why, if the Son purchase Lands and dies without Issue, it shall descend to the Heirs of the Part of the Father; and if he has none, then to the Heirs on the Part of the Mother; because tho' the Son has both the Blood of the Father and of the Mother in him, yet he is of the whole

Blood of the Mother, and the Confangui-

nity of the Mother are Consanguinei Cognati of the Son.

And of the other Side, if the Father had purchased Lands, and it had descended to the Son, and the Son had died without Issue, and without any Heir of the Part of the Father, it should never have descended in the Line of the Mother, but escheated: For the the Consanguinei of the Mother were the Consanguinei of the Son, yet they were not of Consanguinity to the Father, who was the Purchaser; but if there had been none of the Blood of the Grandsather, yet it might have

Sixtbly, That who foever derives a Title 6. Rule.

241

have reforted to the Line of the Grandmother, because her Consanguinei were as well of the Blood of the Father, as the Mother's Confanguinity is of the Blood of the Son: And confequently also, if the Grandfather had purchased Lands, and they had descended to the Father, and from him to the Son; if the Son had entred and died without Issue, his Father's Brothers or Sisters, or their Descendants, or, for want of them, his Great Grandfather's Brothers or Siffers, or their Descendants, or, for want of them, any of the Consanguinity of the Great Grandfather, or Brothers or Sifters of the Great Grandmother, or their Descendants, might have inherited, for the Confanguinity of the Great Grandmother was the Confanguinity of the Grandfather; but none of the Line of the Mother, or Grandmother, viz. the Grandfather's Wife, should have inherited, for that they were not of the Blood of the first Purchaser. And the same Rule è converso holds in Purchases in the Line of the Mother or Grandmother, they shall always keep in the same Line that the first Purchaser settled them in.

But it is not necessary, That he that inherits be always Heir to the Purchaser; it is sufficient if he be of his Blood, and Heir to him that was last seized. The Father purchases Lands which descended to the Son, who dies without Issue, they shall never descend to the Heir of the Part of the Son's Mother; but if the Son's Grandmother has a Brother, and the Son's Great Grandmother

hath

hath a Brother, and there are no other Kindred, they shall descend to the Grandmother's Brother; and yet if the Father had died without Issue, his Grandmother's Brother should have been preferred before his Mother's Brother, because the former was Heir of the Part of his Father tho' a Female, and the latter was only Heir of the Part of his Mother; but where the Son is once seized and dies without Issue, his Grandmother's Brother is to him Heir of the Part of his Father, and being nearer than his Great Grandmothers Brother, is preferred in the Descent.

But Note, This is always intended to long. as the Line of Descent is not broken; for if the Son alien those Lands, and then repurchase them again in Fee, now the Rules of Descents are to be observed as if he were the original Purchaser, and as if it had been

in the Line of the Father or Mother.

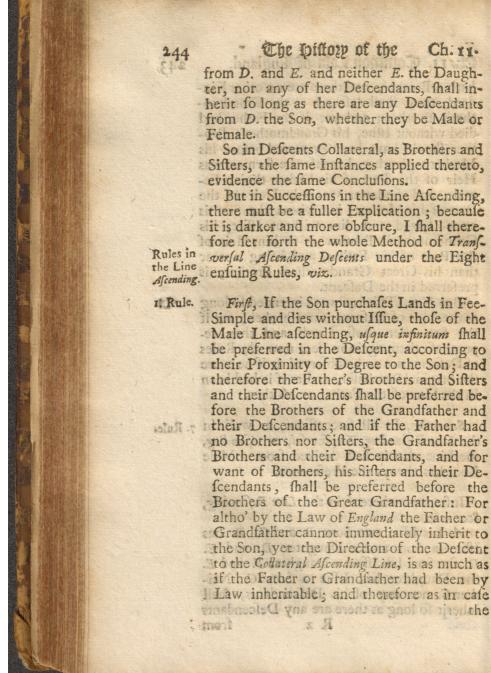
Seventbly, In all Successions, as well in 7. Rules the Line Descending, Transversal, or Ascending, the Line that is first derived from a Male Root has always the Preference.

Instances whereof in the Line Descending, &c. viz.

A. has Issue two Sons B. and C. B. has Iffue a Son and a Daughter D. and E. D. the Son has Iffue a Daughter F. and E. the Daughter has Issue a Son G. Neither C. nor any of his Descendants, shall inherit fo long as there are any Descendants R 2

from

http://www.hathitrust.org/access\_use#pd GMT 16:46 Generated on 2023-03-20 Public Domain / http:/



Secondly, The second Rule is this: That 2. Rule. the Line of the Part of the Mother shall never inherit as long as there are any, tho' never so remote, of the Line of the Part of the Father; and therefore, tho' the Mother has a Brother, yet if the Atavus or Atavia Patris (i. e. the Great-Great-Great-Grandfather, or Great-Great-Great-Grandmother of the Father) has a Brother or a Sifter, he or she shall be preferred, and exclude the Mothers Brother though he is much nearer.

Thirdly, But yet further, The Male Line 3. Rule. of the Part of the Father ascending, shall in Aternum exclude the Female Line of the Part of the Father ascending; and there-R 3 fore

UNIVERSITY OF ILLINOIS AT

http://www.hathitrust.org/access use#pd

Generated on 2023-03-20 16:46 GMT Public Domain / http://www.hathi

Generated on 2023-03-20 16:46 GMT / https://hdl.handle.net/2027/uiuc.83959 Public Domain / http://www.hathitrust.org/access\_use#pd fore in the Case proposed of the Son's purchasing Lands and dying without Issue, the Sister of the Father's Grandfather, or of his Great Grandfather, and so in infinitum shall be preferred before the Father's Mothers Brother, tho' the Father's Mothers Brother be a Male, and the Father's Grandfather or Great Grandfather's Sister be a Female, and more remote, because she is of the Male Line, which is more worthy than the Female Line, though the Female Line be also of the Blood of the Father.

4 Rule.

Fourthly, But as in the Male Line afcending, the more near is preferred before the more remote; fo in the Female Line descending, so it be of the Blood of the Father, it is preferred before the more remote. The Son therefore purchasing Lands, and dying without Isue, and the Father, Grandfather, and Great Grandfather, and so upward, all the Male Line being dead without any Brother or Sifter, or any descending from them; but the Father's Mother has a Sifter or Brother, and also the Father's Grandmother has a Brother, and likewise the Father's Great Grandmother has a Brother: Tho' it is true, that all these are of the Blood of the Father; and tho' the very remotest of them, shall exclude the Son's Mothers Brother; and tho' it be also true. that the Great Grandmother's Blood has passed through more Males of the Father's Blood than the Blood of the Grandmother or Mother of the Father; yet in this Case, ent has the council allegants of the

the Father's Mothers Sifter shall be preferred before the Father's Grandmothers Brother, or the Great Grandmothers Brother, because they are all in the Female Line, viz. Cognati (and not Adgnati), and the Father's Mothers Sister is the nearest, and therefore shall have the Preference as well as in the Male Line ascending, the Father's Brother or his Sifter shall be preferred before the Grandfather's Brother.

Fifibly, But yet in the last Case, where 5. Rule. the Son parchases Lands and dies without Issue, and without any Heir on the Part of the Grandfather, the Lands should descend to the Grandmothers Brother or Sifter, as Heir on the Part of his Father; yet if the Father had purchased this Land and died, and it descended to his Son, who died without Issue, the Lands should not have descended to the Father's Mothers Brother or Sifter, for the Reasons before given in the Third Rule: But for want of Brothers or Sifters of the Grandfather, Great Grandfather, and so upwards in the Male ascending Line, it should descend to the Father's Grandmothers Brother or Sifter which is his Heir of the Part of his Father, who should be preferred before the Father's Mothers Brother, who is in Truth the Heir of the Part of the Mother of the Purchaser. tho' the next Heir of the Part of the Father of him that last died seized; and therefore, as if the Father that was the Purchaser had died without Issue, the Heirs R 4

of the Part of the Father, whether of the Male or Female Line, should have been preferred before the Heirs of the Part of the Mother; fo the Son, who stands now in the Place of the Father, and inherits to him primarily, in his Father's Line dying without Issue, the same Devolution and hereditary Succession should have been as if his Father had immediately died without Iffue, which should have been to his Grandmothers Brother, as Heir of the Part of the Father, tho' by the Female Line, and not to his Mothers Brother, who was only Heir of the Part of his Mother, and who is not to take till the Father's Line both Male and Female be spent.

6. Rule.

Sixtbly, If the Son purchases Lands and dies without Issue, and it descends to any Heir of the Part of the Father, and then if the Line of the Father (after Entry and Possession) fail, it shall never return to the Line of the Mother; tho' in the first Instance, or first Descent from the Son, it might have descended to the Heir of the Part of the Mother; for now by this Descent and Seisin it is lodged in the Father's Line, to whom the Heir of the Part of the Mother can never derive a Title as Heir but it shall rather escheat: But if the Heir of the Part of the Father had not entred, and then that Line had failed, it might have descended to the Heir of the Part of the Mother as Heir to the Son, to

## Ch. 17. Common Law of England.

249

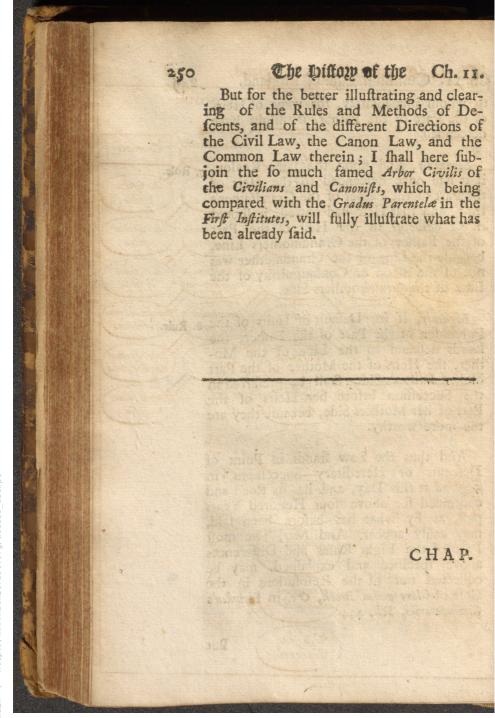
to whom immediately, for want of Heirs of the Part of the Father, it might have descended.

Seventhly, And upon the fame Reason, 7. Ruleif it had once descended to the Heir of
the Part of the Father of the Grandsather's
Line, and that Heir had entred, it should
never descend to the Heir of the Part
of the Father of the Grandmothers Line,
because the Line of the Grandmother was
not of the Blood or Consanguinity of the
Line of the Grandmothers Side.

Eighthly, If for Default of Heirs of the 8. Rule. Purchaser of the Part of the Father, the Lands descend to the Line of the Mother, the Heirs of the Mother of the Part of her Father's Side, shall be preferred in the Succession before her Heirs of the Part of her Mothers Side, because they are the more worthy.

And thus the Law stands in Point of Descents or Hereditary Successions in England at this Day, and has so stood and continued for above four Hundred Years past, as by what has before been said, may easily appear. And Note, The most Part of the Eight Rules and Differences above specified and explained, may be collected out of the Resolutions in the Case of Clare versus Brook, &c. in Planden's Commentaries, Folio 444.

But



T.

#### CHAP. XII.

### Touching Trials by Jury.

Aving in the former Chapter somewhat largely treated of the Course of Descents, I shall now with more Brevity consider that other Title of our Law which I before propounded (in order to evidence the Excellency of the Laws of England above those of other Nations), viz. The Trial by a fury of Twelve Men; which upon all Accounts, as it is settled here in this Kingdom, seems to be the best Trial in the World: I shall therefore give a short Account of the Method and Manner of that Trial, viz.

First, The Writ to return a Jury, issues to

the Sheriff of the County: And,

Is, He is to be a Person of Worth and Value, that so he may be responsible for any Defaults, either of himself or his Officers. And, 2dy, Is Sworn, faithfully and honestly, to execute his Office. This Officer is entrusted to elect and return the Jury, which he is obliged to do in this Manner: r. Without the Nomination of either Party. 2. They are to be such Persons as for Estate and Quality are sit to serve upon that Employment. 2. They are to be of the Neighbourhood of the Fact to

## Ch. 12. Common Law of England.

be inquired, or at least of the County or Bailywick. And, 4. Anciently Four, and now Two of them at least are to be of the Hundred. But Note, This is now in great Measure altered by Statute.

Secondly, Touching the Number and Qua-

lifications of the Jury.

1st, As to their Number, though only Twelve are fworn, yet Twenty four are to be returned to supply the Defects or Want of Appearance of those that are Challenged off, or make Default. 2dly, Their Qualifications are many, and are generally fet down in the Writ that fummons them, viz. 1. They are to be Probi & legales Homines. 2. Of sufficient Freeholds, according to feveral Provisions of Acts of Parliament. 3. Not Convict of any Notorious Crime that may render them unfit for that Employment. 4. They are not to be of the Kindred or Alliance of any of the Parties. And, 5. Not to be fuch as are prepoffessed or prejudiced before they hear their Evidence.

Thirdly, The Time of their Return.

Indeed, in Affizes, the Jury is to be ready at the Bar the first Day of the Return of the Writ: But in other Cases, the Pannel is first returned upon the Venire Facias, or ought to be so, and the Proofs or Witnesses are to be brought or summoned by Distringue or Habeas Corpora for their Appearance at the Trial, whereby the Parties may have Notice of the Jurors, and of their Sufficiency and Indisferency, that so they may make their

Original from UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

253

-

2.

3.

their Challenges upon the Appearance of the Jurors if there be just Cause.

Fourthly, The Place of their Appearance. If it be in Cases of such Weight and Confequence as by the Judgment of the Court is fit to be tried at the Bar, then their Appearance is directed to be there; but in ordinary Cases, the Place of Appearance is in the Country at the Affises, or Nis Prius, in the County where the Issue to be tried arises: And certainly this is an excellent Conftitution. The great Charge of Suits is the attendance of the Parties, the Jury-Men and Witnesses: And therefore tho' the Preparation of the Causes in Point of pleading to Issue, and the Judgment, is for the most part in the Courts at Westminster, whereby there is kept a great Order and Uniformity of Proceedings in the whole Kingdom, to prevent Multiplicity of Laws and Forms; yet those are but of small Charge, or Trouble, or Attendance, one Attorney being able to dispatch Forty Men's Business with the fame Ease, and no greater Attendance than one Man would dispatch his own Business: But the great Charge and Attendance is at the Trial, which is therefore brought Home to the Parties in the Counties, and for the

Fiftbly, The Persons before whom they

most part near where they live.

are to appear.

If the Trial be at the Bar, it is to be before that Court where the Trial is; if in the Country, then before the Justices of Affizes, or Nisi Prius, who are Persons well

acquainted

acquainted with the Common Law, and for the most part are Two of those Twelve ordinary Justices who are appointed for the Common Dispensation of Justice in the Three great Courts at Westminster. And this certainly was a most wise Constitution: For.

1st, It prevents Factions and Parties in the Carriage of Business, which would soon appear in every Cause of Moment, were the Trial only before Men residing in the Counties, as Justices of the Peace, or the like, or before Men of little or no Place, Countenance or Preheminence above others; and the more to prevent Partiality in this Kind, those Judges are by Law prohibited to hold their Sessions in Counties where they

were born or dwell.

2dly, As it prevents Factions and Parttakings, fo it keeps both the Rule and the Administration of the Laws of the Kingdom uniform; for those Men are employed as Justices, who as they have had a Common Education in the Study of the Law, fo they daily in Term-time Converse and Consult with one another; acquaint one another with their Judgments, fit near one another in Westminster-Hall, whereby their Judgments and Decisions are necessarily communicated to one another, either immediately or by Relations of others, and by this Means their Judgments and their Administrations of Common Justice carry a Consonancy, Congruity, and Uniformity one to another, whereby both the Laws and the Administrations thereof are preserved from that Con-

Generated on 2023-03-20 16:46 GMT / https://hdl.handle.net/2 Public Domain / http://www.hathitrust.org/access use#pd

Council, and all By-flanders, and before

## Ch. 12. Common Law of England.

257

the Judge and Jury, where each Party has Liberty of excepting, either to the Competency of the Evidence, or the Competency or Credit of the Witnesses, which Exceptions are publickly stated, and by the Bills of Judges openly and publickly allowed or Excepdisallowed, wherein if the Judge be partial, tion. his Partiality and Injustice will be evident to all By-standers; and if in his Direction or Decision he mistake the Law, either through Partiality, Ignorance, or Inadvertency, either Party may require him to feal a Bill of Exception, thereby to deduce the Error of the Judge (if any were) to a due Ratification or Reversal by Writ of Error.

Nintbly, The Excellency of this open Course of Evidence to the Jury in Presence Excelof the Judge, Jury, Parties and Council, lency of and even of the adverse Witnesses, appears his Trial. in these Particulars:

Ift, That it is openly; and not in private before a Commissioner or Two, and a couple of Clerks, where oftentimes Witnesses will deliver that which they will be

ashamed to testifie publickly.

adly, That it is Ore Tenus personally; and not in Writing, wherein oftentimes, year too often, a crafty Clerk, Commissioner, or Examiner, will make a Witness speak what he truly never meant, by his dreffing of it up in his own Terms, Phrases, and Expressions; whereas on the other Hand, many times the very Manner of a Witness's delivering his Testimony will give a probable IndiIndication whether he speaks truly or falsly: and by this Means also he has Opportunity to correct, amend, or explain his Testimony upon further Questioning with him. which he can never have after a Deposition is let down in Writing.

adly, That by this Course of personal and open Examination, there is Opportunity for all Persons concern'd, viz. The Judge, or any of the Jury, or Parties, or their Council or Attornies, to propound occafional Queftions, which beats and bolts out the Truth much better than when the Witnels only delivers a formal Series of his Knowledge without being interrogated; and on the other Side, preparatory limited, and formal Interrogatories in Writing, preclude this Way of occasional Interrogations, and the best Method of searching and sisting out the Truth is choak'd and suppress'd.

4thly, Also by this personal Appearance and Testimony of Witnesses, there is Opportunity of confronting the adverse Witnesses, of observing the Contradiction of Witnesses sometimes of the same Side, and by this Means great Opportunities are gained for the true and clear Discovery of the Truth.

stbly, And further, The very Quality, Carriage, Age, Condition, Education, and Place of Commorance of Witnesses, is by this Means plainly and evidently fet forth to the Court and the Jury, whereby the Judge and Jurors may have a full Information of them, and the Jurors as they see Cause may give

trust.org/access use#pd GMT Generated on 2023-03-20 Public Domain / http:/ give the more or less Credit to their Testimony, for the Jurors are not only Judges of the Fact, but many times of the Truth of Evidence; and if there be just Cause to disbelieve what a Witness swears, they are not bound to give their Verdict according to the Evidence or Testimony of that Witness; and they may sometimes give Credit to one Witness, tho' oppos'd by more than And indeed, it is one of the Excellencies of this Trial above the Trial by Witnesses, that altho' the Jury ought to give a great Regard to Witnesses and their Testimony, yet they are not always bound Vide prox. by it, but may either upon reasonable Cir- Pag. cumstances, inducing a Blemish upon their Credibility, tho' otherwise in themselves in Strictness of Law they are to be heard, pronounce a Verdict contrary to such Testimonies, the Truth whereof they have just Cause to suspect, and may and do often pronounce their Verdict upon one fingle Testimony, which Thing the Civil Law admits not of.

Tenthly, Another Excellency of this Trial is this; That the Judge is always present at the Time of the Evidence given in it: Herein he is able in Matters of Law emerging upon the Evidence to direct them; and allo, in Matters of Fact, to give them a great Light and Affistance by his weighing the Evidence before them, and observing where the Question and Knot of the Business lies, and by shewing them his Opinion even in Matter of Fact, which is a great

S 2

IO.

II.

Advantage and Light to Lay-Men: And thus, as the Jury affifts the Judge in determining the Matter of Fact, fo the Judge affifts the Jury in determining Points of Law, and also very much in investigating and enlightening the Matter of Fact, where-

of the Jury are Judges.

Eleventhly, When the Evidence is fully given, the Jurors withdraw to a private Place, and are kept from all Speech with either of the Parties till their Verdict is delivered up, and from receiving any Evidence other than in open Court, where it may be fearch'd into, discuss'd and examin'd. In this Recess of the Jury they are to consider their Evidence, and if any Writings under Seal were given in Evidence, they are to have them with them; they are to weigh the Credibility of Witnesses, and the Force and Efficacy of their Testimonies. wherein (as I before faid) they are not precifely bound to the Rules of the Civil Law, viz. To have Two Witnesses to prove every Fact, unless it be in Cases of Treason, nor to reject one Witness because he is single, or always to believe Two Witnesses if the Probability of the Fact does upon other Circumstances reasonably encounter them; for the Trial is not here simply by Witnesses, but by Jury; nay, it may so fall out, that the Jury upon their own Knowledge may know a Thing to be false that a Witness fwore to be true, or may know a Witness to be incompetent or incredible, tho' nothing

In Treafon, Two Witneffes.

## Ch. 12. Common Law of England.

thing be objected against him, and may

give their Verdict accordingly.

Twelfthly, When the whole Twelve Men are agreed, then, and not till then, is their Verdict to be received; and therefore the Majority of Affentors does not conclude the Minority, as is done in some Countries where Trials by Jury are admitted: But if any One of the Twelve diffent, it is no Verdict, nor ought to be received. It is true, That in ancient Times, as Hen. II. and Hen. III.'s Time, yea, and by Fleta in the Beginning of Edw. I.'s Time, if the Jurors differted, fometimes there was added a Number equal to the greater Party, and they were then to give up their Verdict by Twelve of the old Jurors, and the Jurors to added; but this Method has been long Time antiquated, notwithstanding the Practice in Bracton's Time, Lib. 4. cap. 9. and Fleta, lib. 4. cap. 9. for at this Day the entire Number first empannell'd and sworn are to give up an unanimous Verdict, otherwise it is none. Verdict And indeed this gives a great Weight, Value unaniand Credit to fuch a Verdict, wherein mous. Twelve Men must unanimously agree in a Matter of Fact, and none diffent; though it must be agreed, that an ignorant Parcel of Men are sometimes governed by a few that are more Knowing, or of greater Interest or Reputation than the rest.

Thirteenthly, But if there be Matter of Law that carries in it any Difficulty, the Jury may, to deliver themselves from the Danger of an Attaint, find it specially, that so it may Special

12.

13.

Verdia.

be decided in that Court where the Verdict is returnable; and if the Judge over-rule the Point of Law contrary to Law, whereby the Jury are perfwaded to find a general Verdict (which yet they are not bound to do if they doubt it), then the Judge, upon the Request of the Party desiring it, is bound by Law in convenient Time to seal a Bill of Exceptions, containing the whole Matter excepted to; that so the Party grieved, by such Indiscretion or Error of the Judge, may have Relief by Writ of Error on the Statute of Westminster 2.

Bill of Exceptions.

14.

Judgment.

Fourteenthly, Altho' upon general Verdicts given at the Bar in the Courts at Westminster, the Judgment is given within Four Days, in Prefumption that there cannot be any confiderable Surprize in fo folemn a Trial, or at least it may be soon espied; yet upon Trials by Niss prims in the Country, the Judgment is not given presently by the Judge of Nisi prius, unless in Cases of Quare Impedits: But the Verdict is returned after Trial into that Court from whence the Cause issued, that thereby, if any Surprize happened either through much Business of the Court, or through Inadvertency of the Attorney or Council, or through any Miscarriage of the Jury, or through any other Cafualty, the Party may have his Redress in that Court from whence the Record issued.

And thus stands this excellent Order of Trial by Jury, which is far beyond the Trial by Witnesses according to the Proceedings

http://www.hathitrust.org/access\_use#pd GMT 16:46 Generated on 2023-03-20 Public Domain / http:/ ceedings of the Civil Law, and of the Courts of Equity, both for the Certainty, the Dispatch, and the Cheapies thereof: It has all the Helps to investigate the Truth that the Civil Law has, and many more. For, as to Certainty,

as well as the Civil Law and Equity Courts.

2dly, It has this Testimony in a much more advantageous Way than those Courts

for discovery of Truth.

3dly, It has the Advantage of the Judge's Observation, Attention, and Assistance, in Point of Law by way of Decision, and in Point of Fact by way of Direction to the Jury.

and of their being de Viceneto, who oftentimes know the Witnesses and the Parties:

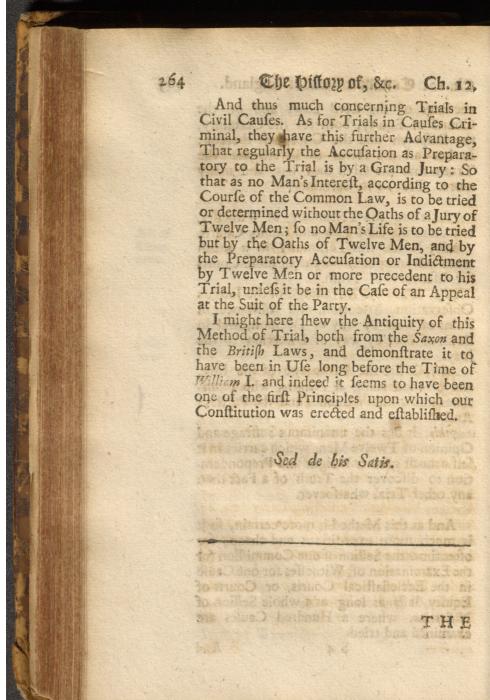
And,

orthly, It has the unanimous Suffrage and Opinion of Twelve Men, which carries in it felf a much greater Weight and Preponderation to discover the Truth of a Fact than any other Trial whatsoever.

And as this Method is more certain, so it is much more expeditious and cheap; for oftentimes the Session of one Commission for the Examination of Witnesses for one Cause in the Ecclesiastical Courts, or Courts of Equity, lasts as long as a whole Session of Nist prins, where a Hundred Causes are examined and tried.

4

And



THE

# TABLE.

A.

CTS of Parliament, many loft, Page 21 Admiralty, its Jurisdiction, &c. 35, 36, 37 Adgnati & Cognati, their Difference. Answers of Petitions in Parliament. 48, 49, 51 Ancient Demesne, quid. Ancient Manner of enacting Laws. 14, 15 Ancient Statutes. 3 to 15, oa 160 to 163 Appeals in Parliament. Appellations of the Common Law. 54 Arbor Civilis .-291 Arthur Earl of Brittany. 113, 114 Articles of Justices Itinerant. Attaints.

B. Ba-

B.

| Baftards inheritable. Page 220,  | 221  |
|--|--|
| Battle, Trial by it.   | 113  |
| Becket (Archbishop) his Insolence.   | 128  |
| Bishop's Consistory sever'd from the She   | eriff's  |
| Court.   | , 32   |
| Berwick, by what Law govern'd.   | 184  |
| Bills of Exception. 257,   | 262  |
| Borne (Francis) and Thomas Adorne, their   | Case.  |
| m C (mm)!!   | 129  |
| Bosco (William) vers. Jeosfry Rusham.  | Ibid.  |
| Bracton cited. 107, 120, 157   |  |
| British Laws 64, 220, Brompton cited. 4, 88, 89,   |  |
| Brompton cited. 4, 88, 89, Bundles of Petitions in Parliament.   | 221  |
|  |  |
| Butler's Ordinance.  | 19   |
| Sheet 3 Armitration  | 14   |
| The second secon |  |
| to entire which are presumate and  |  |
| Admiration of the state of the  |  |
| ni & Counci, cheir Difference, and   |  |
| Canon and Civil Law, of what Force   | here.  |
| Canon and Civil Law, of what Force 28 to 33 Causeia (William) his Case.  | here.  |
| Canon and Civil Law, of what Force 28 to 33 Causeia (William) his Case. Charters of King Jahn. 8, 148,   | here. , 73 121 6c.                                     |
| Canon and Civil Law, of what Force 28 to 33 Causeia (William) his Case. Charters of King fohn. 8, 148, Charters of Saxon Kings pleaded. 96,  | here. , 73 121 6c.                                     |
| Canon and Civil Law, of what Force 28 to 33 Causeia (William) his Case. Charters of King John. 8, 148, Charters of Saxon Kings pleaded. 96, Charters for restoring Lands. 99, 100  | here. , 73 121 6c.                                     |
| Canon and Civil Law, of what Force 28 to 33 Causeia (William) his Case. Charters of King John. 8, 148, Charters of Saxon Kings pleaded. 96, Charters for restoring Lands. 99, 100, Chaucer (Adam) his Case.  | here. 73 121 6c. 118 6c. 47                            |
| Canon and Civil Law, of what Force 28 to 33 Causeia (William) his Case. Charters of King John. 8, 148, Charters of Saxon Kings pleaded. 96, Charters for restoring Lands. 99, 100, Chaucer (Adam) his Case. Chopimus, de Domanio Franciae cited.   | here. 73 121 6c. 118 6c. 47 113                        |
| Canon and Civil Law, of what Force 28 to 33 Causeia (William) his Case. Charters of King John. 8, 148, Charters of Saxon Kings pleaded. 96, Charters for restoring Lands. 99, 100, Chaucer (Adam) his Case. Chopimus, de Domanio Francia cited. Church Lands not confiscated.  | here. 73 121 6c. 118 6c. 47 113                        |
| Canon and Civil Law, of what Force 28 to 33 Causeia (William) his Case. Charters of King John. 8, 148, Charters of Saxon Kings pleaded. 96, Charters for restoring Lands. 99, 100, Chaucer (Adam) his Case. Chopimus, de Domanio Franciae cited.   | here. , 73 121 6c. , 118 , 6c. 47 113 99 145,          |
| Canon and Civil Law, of what Force 28 to 33 Causeia (William) his Case. Charters of King John. 8, 148, Charters of Saxon Kings pleaded. 96, Charters for restoring Lands. 99, 100, Chaucer (Adam) his Case. Chopimus, de Domanio Franciae cited. Church Lands not consiscated. Clergy, their Insolencies check'd. 110,   | here. , 73 121 6c. , 118 , 6c. 47 113 99 145, 160      |
| Canon and Civil Law, of what Force 28 to 33 Causeia (William) his Case. Charters of King John. 8, 148, Charters of Saxon Kings pleaded. 96, Charters for restoring Lands. 99, 100, Chaucer (Adam) his Case. Chopimus, de Domanio Francia cited. Church Lands not consiscated. Clergy, their Insolencies check'd. 110, Common Law, quid, &c. 23 to  | here. , 73 121 6c. , 118 , 6c. 47 113 99 145, 160 0 28 |
| Canon and Civil Law, of what Force 28 to 33 Causeia (William) his Case. Charters of King John. 8, 148, Charters of Saxon Kings pleaded. 96, Charters for restoring Lands. 99, 100, Chaucer (Adam) his Case. Chopimus, de Domanio Francia cited. Church Lands not consiscated. Clergy, their Insolencies check'd. 110, Common Law, quid, &c. 23 to Li's Preheminence. 42 to   | here. , 73 121 6c. , 118 , 6c. 47 113 99 145, 160 0 28 |

Par Totum. Three Conftituents thereof.
Page 66, 67, &c.
Common Law Matters refused Relief in
Parliament.

47, 48, 49
Common-Pleas Court. 143,150,152,157,160
Conftitutions of Clarendon.

6, 138
Competitors for the Crown of England. 88

### D.

Danish Laws. 55, 62, 64, 105, 106, 221
Denominations of the Common Law. 54
Descents, the Laws thereof. 113, 117, 121.

Et vide Chap. 11. per Totum.

Distum de Kenelworth. 20, 158
Divorces, their Kinds and Effects. 34, 35
Doomsday-Book. 95, 109
Double Portion among the Jews. 209, 211
Drenges, who so called. 96, 98

### E.

Ecclesiastical Courts and their Jurisdiction, &c. 30 to 35, 103, 110, 160

Edgar Atheling, his Title to the Crown. 88

Edingthorp (Adam) his Case. 47

Edmund Earl of Kent, his Case. 41

Edward the Confessor's Laws. 4, 55, 56, 106, 118

Elder Brother's (Son) to inherit or not. 113, 159, 230, 231, 234, 240

English Laws settled in Ireland. 154

And in Wales.—And in Scotland.

Exche-

| <b>自然的</b> 物的 | A CONTRACTOR OF THE PARTY OF TH |
|---------------|--|
|               |  |
|               |  |
|               | The TABLE.   |
|               | Exchequer Court. Page 160  |
|               | Excomunicato Capiendo.   |
|               | ni lalia A beliner a Field vi I comerci  |
|               | Dougla like Total late to  |
|               | Feuds, the Laws thereof. 217, 224<br>Fredrick, Abbot of St. Albans. 104, 105   |
|               | French Of Norman Laws. 197   |
| T MIN         | French Tongue endeavoured to be intro-   |
| P HHAI        | duced. Fines, pro Stultiloquio (sive) pro Pulchre placi-   |
|               | tando.   |
|               | Pro Licentia Concordandi. 151  |
|               | Pro habenda Inquisitione. 153 Fleta cited. 232   |
|               | Fulch (William) a Judge, his Case. 120   |
|               | 一个一个一个一个一个一个一个一个一个一个一个一个一个一个一个一个一个一个一个   |
|               | 15 the spong of Cours from works   |
|               | Gervasius Tilburiensis cited. 98, 106, 107, 109  |
|               | Gianville cited. 117, 118, 121, 132, 139,  |
|               | Grand Coutumier of Normandy cited. 113,  |
|               | 115. &c. to 122, 127, 126  |
|               | Grants by King William I. 100, 101   |
|               | Græcians, their Law of Descents. 211, 212,   |
|               | Guernsey and Fersey Islands. 113, 115, 184   |
|               | to 189   |
|               | H.   |
|               | The first size (south) and the south size of the confidence of the |
| A MINIS       | Harold's Usurpation, &c. 88, 89<br>Hebrews, their Laws of Descents. 209, 210,  |
| N BRANT       | 211  |
| N M M         | Holcos.  |
|               |  |
| 15            |  |
|               |  |

Holcot cited.

Homagium repellit perquisitum.

159, 230

Howeden cited.

6, 8, 56, 85, 88, 105, 138,

147

I.

Feronymus (Robert) his Case.

Jersey and Guernsey Islands, &c. 113, 114,

115, 184 to 189

Fews, Vide Hebrews.

Impeachments and Appeals.

Impeachments and Appeals.

141

Ingulphus cited.

Judgments in Parliament.

145, 50, 51, &c.

Judges of the Common Law, Expounders of all Statutes.

142

Judicial Decisions, a Part of the Common

Judicial Decisions, a Part of the Common Law.

68, 69, 70

Jurisdiction Temporal, separated from Ecclesiastical.

22, 33, 103, 110

Ireland conquered.

English Laws settled there.

Jus Primogenitura. 209, 211

Jus Representationis. 209, 216, 232, 240

### K.

Laws of the Danes

Kenelworth Edict. 20, 158
Kent (Earl Edmond) his Case. 41
Customs of Kent. 225, 226
Knolles (Sir Robert) his Case. 47
King Edgar's Laws, &c. 56, 85, 87
King

| and the second |   |
|----------------|---|
| 1/ 機關          |   |
|                | The TABLE.  |
|                | K. Edward the Confessor's Laws. Page 4, 55,   |
|                | &c. 118   |
|                | King William I. his Laws.  — Not impos'd by Conquest.  73                             |
|                | — His Title to the Crown 87, 88 — His Conquest of Harold, not of the                  |
|                | Kingdom. 86, 89   |
| 2 分開           | — What he did afterward. 94, &c. 103, &c. 223, 224                                    |
|                | — Confirms the English Laws, and adds   |
|                | others. 105, 107<br>King Henry I. his Laws. 5, 6, 226                                 |
|                | King Richard I. his Laws. 7, 8 King John, his Laws, &c. 8, 113, 115,                  |
|                | 148, 154, 155, 231  |
|                | King Stephen, his Laws, &c. 137<br>King Henry II. his Laws. 6, 137, 138, 227          |
|                | King Henry III. his Laws. 155, 157, 232<br>King Edward I. his Laws, &c. 158, 160, &c. |
|                | King Edward II. and III. their Laws. 167  |
|                | lengto 170  |
|                | Art County Date L. Mood difference  |
|                | Lambard cited. 4,5,6,65,86,221,222,225  |
|                | Laws, their Kinds, &c. Pag. 1, 2, and   |
|                | Laws of the Danes, Mercians and West Saxons.  |
|                | Laws of England, their Qualifications. 71,  |
|                | 72, 73  |
|                | — Not impos'd by Conquest. 73 — Nor deriv'd from the Normans, 111,                    |
| W              | &c. Sed è contra. Vide Chap. 6. per Totum.  —Not                                      |
|                | 4 — Not   |
| 1              |   |
|                |   |

- Not altered by K. William I. 91, 93, Oc. 103, &c. But confirm'd by him, 105, 106. And others add, Communi Concilio Regnis Page 107, 108 Lands not forfeited by the Conquest. Leproly, the Law thereof. 120, 230 Leicester, the Abbot, his Case. 152 Lex Mercatoria Forestæ, &c. 26 Limitation, the several Times thereof. 123, 124, 130, 144 Lindwood cited. Litchfield's Chronicle cited. 85, 105 Lombards, their Laws of Descents. Lowther (Hugh) his Case. 47 M. Magna Charta, the History thereof. 149, 155 Magnus Rot. Statutorum. 14, 15, 17 Maun, of the Laws of that Island. 184 Manner of enacting Laws. Marshall (John) and Robert Jeronymus, their

Manner of enacting Laws. 14, 15

Marshall (John) and Robert Jeronymus, their
Case. 129

Martial Law. 40, 41, 42

Mat. Paris cited. 6, 8, 87, 105, 114, 115, 150, 155, ©c.

Mercian Laws. 55, 63, 106 Military Court, its Jurisdiction, &c. 37,

Murder, the Law about it. 107

N.

Naval Laws, their Force.

Necossitas defendit quod cogit.

Nemo potest esse Dominus & Hæres (vel Tenens)

Nolumus

# The TABLE. Nolumus Leges Angliæ Mutare. Page 54 Norman Laws, 64, 104, 107, 217, 218. Vide Chap. 6. per Totum. - Causes of their Similitude, with the English Laws. 126, 00. Norman Language and Laws endeavoured to be introduced. Normandy, how long united with England, - Forms of Writs there. Pleas of Land there. Norwich, the Bishop's Case. Lauriber (Hard) his O 3, 7, 8, 9, 17, 18, 19 Old Statutes. Ordeal Trial. Orders of the Earl, Constable and Marshal. Ordonationum Rotulus. Original of the Common Law. Vide Chap. 4. per Totum. Oxford University, its Case. 87, 109, 114, 119, 150, 455, Oca Parliaments, and Acts of Parliament. 8 to 12, 21 Parliamentary Records. 12 to 20 Parliament refer Matters to the Common 47, 48, 49 Law. Partible or not partible, i.e. Lands, &c. 153, 154, 217, 218, 222 Perchard (John) his Case. Petit's Leges Attica cited. 211 Petitions

| The T A B L B.   |
|--|
| Petitions in Parliament. Page 14, 47, 48,  |
| 49, Oc.  |
| Petition of Right. 41  |
| Pinendon Record. Oct - 200, 100  |
| Placitorum Parliamenti Liber.  |
| Pleas of Land in Normandy. 129   |
| Pope and the Clergy, their Infolencies check d.  |
| 28, 29, 110, 145, 160  |
| Prærogative Lex. 26  |
| Preheminence of the Common Law. 42.  |
| To Chan a non Totame   |
| Progress of the Laws. 134 to 140   |
| Statute Laws, their Kinds, On Pag. 2 to g.   |
| Progress of the Laws.  |
| Statutes in particular, Our  |
| Magna Coarta. 8, 17, 155, 165 163  |
| Qualifications of the English Laws. 71, 72,  |
| TE OF PERSON NOT 72. O'C.  |
| Queen's-Bench Courf. 49, 150, 152, 157<br>Queen Mand, her Title, Oc. 2 137   |
| Queen Mand, her Title, Oc. S. doin 8 137   |
| 13 Rich. 2. cip 2.   bid.  |
| 2 Mich Z. (17) 15.   |
| Is Kich. 2. cap. 28  |
| 1 Hen. 4. cap. 14. 50, ca.   |
| Radulphus de Diceto citedan & MAH 85 TY2   |
| Ranulphus Cestrensis cited. 700 g. what 0 56   |
| Rationabile parte Bonorum  |
| Rhacola (Henry) his Case. (1921) 152   |
| Red Book of the Exchequer. 6, 150  |
| Romans, their Indulgence to the Conquered,   |
| in Matters of Law and Religion. 80, 81   |
| Their Laws of Descents, 214, 215   |
| Their Laws of Descents. 214, 215 Rotulus Ordonationum. 13 Rotulus Statutorum. 14, 15, 17   |
| Rotulus Statutorum 14.15.17  |
| Trials By Barries  |
| T S. Saxon   |
| A Company of the Comp |
|  |

### The TABLE. Scittions in Parliament. Petition of Right. Saxon Laws Page 4, 5, 6, 55, 64, 106, 221 Seifina facis Stipitem. 241 Selden cited. 5,32, 96, 100, 106, 109, 146, Jano signalo na 1209, 211, 222, 224 Sharnborn (Edwin) his Plea and Recovery. Sheriffs before the Conquest. Sheriff's Court. 31, 103 Spelman cited. Statute Laws, their Kinds, &c. Pag. 2 to 9, Vide 67 Statutes in particular, viz. 50 — Magna Charta. 8, 17, 155, 156, 160 - 24 Hen. 8. cap. 12.311 to anostroni 30 - 25 Hen. 8. cap. 19, 20, 21. Ibido - 27 Hen. 8. cap. 24. 1990 31 8 Rich. 2. cap. 5.17 and hand 10038 \_\_\_ 13 Rich. 2. c.p. 2. Ibid. \_\_\_ 13 Rich. 2. c.p. 15. 36 - 15 Rich. 2. cap. 3. Ibid. - I Hen. 4. cap. 14. 50, 51 28 Edw. 3. cap. 3.0 of sill she and 54 36 Edw. 3. cap. 15.10 aland 104 --- Westminster 1. cap. 35. Strongbow (Earl) what he did. 146 Red Book of the Exchequer 6, 170 Rentens, their Indulgence to the Conquered, in Marters of Law all Religion. 80, 81 - Their Laws of Delcents. ZIA, ZIF Times of Limitation. 123, 124, 130, 144 Time of Memory, guid, &c. 2, 3, 4, 6, Trials: By Battle. 113 - By D. Sanca

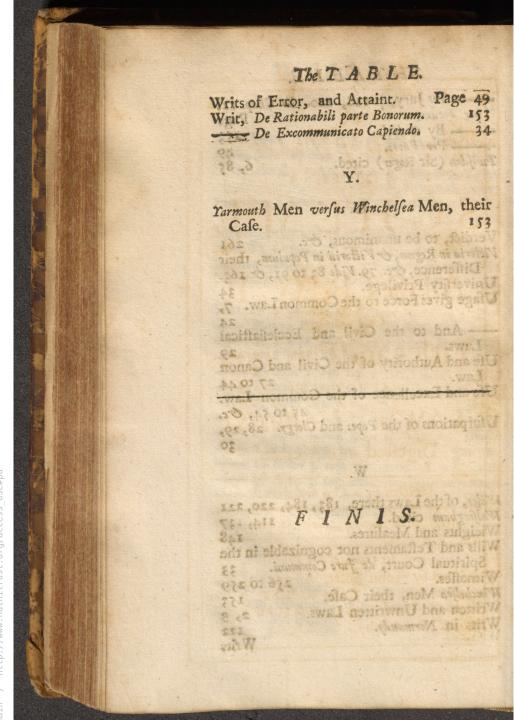
| By Jury, p. 118, 120. Et   | Chap. 12. |
|--|-----------|
| the bear a comment of the same | Page      |
| by Graeat. I sandtentioned   | -153      |
| rer rares.   | 49        |
| Twisden (Sir Roger) cited.   | 6, 85     |

# Township Men verfus Unchelfen hien, their

| Word: O. and I am .                             |
|---|
| Verdick, to be unanimous, &c. 261               |
| Victoria in Regem, & Victoria in Populum, their |
| Tim Regems O' ictoria in Populum, their         |
| Difference, &c. 79. Vide 83 to 91, & 163.       |
| Thirtonies Dainil                               |
| University Privilege.                           |
| Wage gives Force to the Comment 34              |
| Usage gives Force to the Common Law. 7,         |
|   |
| And so she Civil and T : 24                     |
| And to the Civil and Ecclefiaftical             |
|   |
| Tife and Ambain C 1 or m 29                     |
| Use and Authority of the Civil and Canon        |
|   |
|   |
| Use and Excellence of the Common Law.           |
| adw.  |
| 176 marian - 5.1 - 45 to 54, 60c.               |
| Ulurpations of the Popes and Claure -0          |
| Usurpations of the Popes and Clergy. 28,29,     |
| 20  |
|   |

# W.

| Wales, of the Laws there. 183, I   | 84. 220 228   |
|--|---------------|
| Walsingham cited.  |               |
| Wieights and Measures.   | 114, 137      |
| Will J. T. O.  | 148           |
| Wills and Testaments not cogn  | izable in the |
| Spiritual Court, de Jure Com   | men a         |
| Witnesses.   |               |
|  | 256 to 259    |
| Winchelsea Men, their Case.  | 153           |
| Written and Unwritten Laws.  |               |
| Writs in Normandy.   | 2, 3          |
| Welson's Bearing   | 122           |
| A least reason of the control of the | Writs         |
|  |               |



Generated on Public Domain

THE

Analysis of the Law:

BEINGA

SCHEME,

OR

ABSTRACT,

Of the feveral

**Titles and Partitions** 

OFTHE

LAW of ENGLAND,

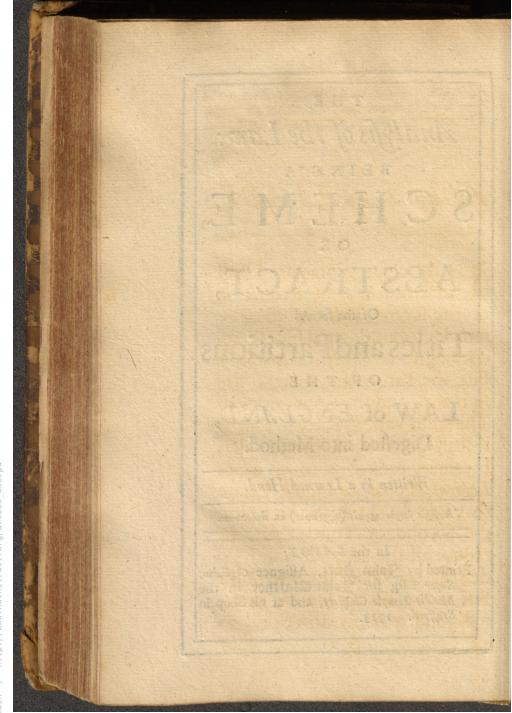
Digested into Method.

Written by a Learned Hand.

'Aus ejt sinais κας πός (κ) γεαφός) હંમ ਕੇπόλλυπα.

In the SAVOY:

Printed by John Rutt, Assignee of Edw. Sayer Esq; for John Walthoe in the Middle-Temple Cloisters, and at his Shop in Stafford. 1713:



### THE

WBO264

# Author's PREFACE.

N the ensuing Tractate I shall make an Essay of Reduction of the feveral Titles of the Law into Distributions and Heads (according to an Analytical Method). But the Particulars thereof are fo many, and the Connexions of Things fo various therein, that as I shall beforehand confess that I cannot reduce it to an exact Logical Method, fo I must declare that I do despair at the First, year the Second or Third Esfay, to reduce all the (considerable) Titles thereof under this Method : But many Things will be omitted, and possibly therefore, as A 2 they

they shall occur to my Memory, will perchance be disorderly shuffled in under such of the Distributions as may not be so proper for them, or at least inserted brokenly, without their just Dependance, till upon a Second or Third, or, perhaps, further Essay, this Scheme or Abstract may be entirely new fram'd.

However, the following Essay will do thus much Good, viz.

First, It will discover that it is not altogether impossible, by much Attention and Labour, to reduce the Laws of England at least into a tolerable Method or Distribution.

Secondly, It will give Opportunity both to my felf and others, as there shall occur new Thoughts



or

or Opportunities, to rectify, and to reform what is amis in this, and to supply what is wanting; whereby, in Time, a more Methodical System or Reduction of the Titles of the Law, under Method, may be discovered.

Thirdly, That altho', for the most Part, the most Methodical Distributors of any Science rarely appear subtile or acute in the Sciences themselves, because while they principally study the former, they are less studious and advertent of the latter; yet a Method, even in the Common Law, may be a good Means to help the Memory to find out Media of Probation, and to assist in the Method of Study.

And altho' the Laws of England are generally distributed into the Common Law, and Statute Law, I A 3 shall

shall not distribute my Analysis according to that Method, but shall take in and include 'em both together, as constituting one Common Bulk or Matter of the Laws of England. Nor shall I confine my self to the Method or Terms of the Civil Law, nor of others who have given general Schemes and Analysis's of Laws; but shall use that Method, and those Words or Expressions that I shall think most conducible to the Thing I aim at.

The Laws of this Kingdom do respect either,

1. Civil Rights; cr,

2. Crimes and Misdemeanors.

This I shall substitute as the general Matter of the Laws of England, not troubling my self with Criticisms or Propriety of Words, in which Respect the very Word

Word Civil includes also Matters Criminal, because Civil Constitutions give the Denomination of Crimes, and the Rules and Method of their Punishment; but it shall be sufficient that I use such Expressions as either are in themselves proper to express the Thing I mean, or that by my Usage and Application of them, I render them serviceable to that Purpose and End.

I shall therefore divide the Laws of this Kingdom, in relation to their Matter, into Two Kinds:

- 1. The Civil Part, which concerns Civil Rights, and their Remedies.
- 2. The Criminal Part, which concerns Crimes and Mifdemeanors.

A 4

And

And these, to avoid Consusion, I shall dispose into several Sections.

And First, I begin with the Law as it relates to Civil Matters.

The Reader is defined to add at Page 9. Line 21. after Grievances, the ensuing Paragraph.

And here all the Learning of Parliaments properly comes in, viz. The Persons of whom it consists; the Members of each House; the Manner of their Summons; the Places that fend Members to the House of Commons; and how to be qualify'd, how elected, and the Qualifications of the Electors: What the Privileges of Parliament are; the Method of passing Bills, &c. and how adjourned, prorogued, or dissolved.

THE

Generated on 2023-03-20 16:46 GMT / https://hdl.handle.net/2027/uiuc.8395964
Public Domain / http://www.hathitrust.org/access use#pd

THE

# CONTENTS.

SECT. I.

OF the Civil Part of the Law (in general.)

Page r

SECT. II.

Of the Relation of Persons, and the Rights thereby arising. Page 5

SECT. III.

Of such Rights as relate to the King's Person. Page 6

SECT. IV.

Concerning the Prerogatives of the King.
Page 10

SECT. V.

Concerning the King's Rights of Dominion or Power of Empire. Page 11

SECT. VI.

Of the Potestas Jurisdictionis; or, The King's Right or Power of Jurisdiction.
Page 18

SECT. VII.

Concerning the Census Regalis; or, The King's Royal Revenue. Page 27

SECT. VIII.

Of the King's Temporal Revenue. Page 27

SECT. IX.

Of the Relative Prerogatives of the Crown.
Page 20

SECT. X.

Of the Subordinate Magistrates: And First,
Of Ecclesiastical. Page 32

SECT. XI.

Concerning Temporal Magistrates. Page 36

SECT

# ated on 2023-03-20 16:46 GMT / https://hdl.handle.net/2027/uiuc.8395964 c Domain / http://www.hathitrust.org/access use#pd

The Contents.

SECT. XII.

Of Inferior Magistrates, Sine Jurisdictione.
Page 40

SECT. XIII.

Of the Rights of the People or Subject.
Page 42

SECT. XIV.

Of the Rights of Persons under Relations
Oeconomical: And first, of Husband and
Wife.
Page 45

SECT. XV.

Concerning the Relation of Parent and Child.

Page 49

SECT. XVI.

Of the Relation of Master and Servant.
Page 50

SECT. XVII.

Concerning Relations Civil.

Page 51

SECT. XVIII.

Concerning Ancestor and Heir. Page 52

The Contents. SECT. XIX. Concerning Lord and Tenant. Page 53 SECT. XX. Concerning Guardian and Pupil. Page 54 SECT. XXI. Of Lord and Villein. Page 56 SECT. XXII. Concerning Persons or Bodies Politick, i. e. Corporations. Page 56 SECT. XXIII. Concerning the Jura Rerum, and the General Division thereof. Page 61 SECT. XXIV. Concerning Things Real, and their Distribution. Page 65 SECT. XXV. Concerning Things Ecclefiaftical or Spiritual. Page 71 SECT. XXVI. Of the Nature and Kinds of Properties. Page 74 SECT 'TDE8

SECT. XXVII.

Of Acquisition of Property by Act in Law. Page 78

SECT. XXVIII.

Acquisition of Property by Act of the Party, and Mix'd Acts. Page 79

SECT. XXIX.

Concerning the Rights of Things Real.
Page 81

SECT. XXX.

Of Estates in Fee-Simple and Fee-Tail.
Page 82

SECT. XXXI.

Of Estates at Common Law, less than Inheritance. Page 86

SECT. XXXII.

Of the Distinction of Rights of Estates, with relation to the Possession. Page 88

SECT. XXXIII.

Touching Acquisition and Translation of Estates in Things Real. First, By Act in Law. Page 92

SECT.

TOFF

S E C T. XXXIV.

Concerning Acquests by Means of the Party: And First, By Record. Page 96

SECT. XXXV.

Concerning Conveyances by Matter in Pais.

And First, Of Deeds. Page 99

S E C T. XXXVI.

Of Conveyances by Force of Statutes.
Page 106

SECT. XXXVII.

Concerning Customary Estates. Page 107

SECT. XXXVIII.

Of Translation of Property by Forfeiture: Page 110

SECT. XXXIX.

Of Wrongs or Injuries. And First, Of Wrongs to Persons. Page III

SECT. XL.

Of Wrongs to Persons under Relation. Page 117

SECT. XLI.

Of Wrongs in relation to Rights of Things. And First, Of Things Personal. Page 120

SECT. XLII.

Touching Wrongs to Things Real, without dispossessing the Party; and their Remedies. Page 124

SECT. XLIIL

Concerning Wrongs which carry with them an Amotion of Possession. Page 129

SECT. XLIV.

Of Wrongs that have the Countenance of Legal Proceedings of Courts. Page 136

SECT. XLV.

Concerning Remedies, and the Method of of obtaining them. Page 139

SECT. XLVI.

Remedies at Common Law: And First, Of those without Suit. Page 141

SECT. XLVII.

Concerning Remedies at Common Law by Suit, Page 144

S E C T. XLVIII.

Of Process and Appearing. Page 148

SECT

The Contents. SECT. XLIX. Of Pleading. Page 150 SECT. L. Of Issues. Page 157 SECT. LI. Of Trials. Page 159 SECT. LII. Of Judgment. Page 162 SECT. LIII. Of Execution. Page 165 SECT. LIV. Of Redress of Injuries by Error, &c. Page 169 he strong and Appending and Dagot 43 THE TOBS

THE

The studying of the Law.

# ANALYSIS

OFTHE

# LAW.

SECT. I.

Of the Civil Part of the Law (in general):

THE Civil Part of the Law concerns,

1. Civil Rights or Interests.

2. Wrongs or Injuries relative to those Rights.

3. Relief or Remedies applicable to those Wrongs.

Now all Civil Rights or Interests are of Two Sorts:

1. Jura Personarum, or Rights of Persons.

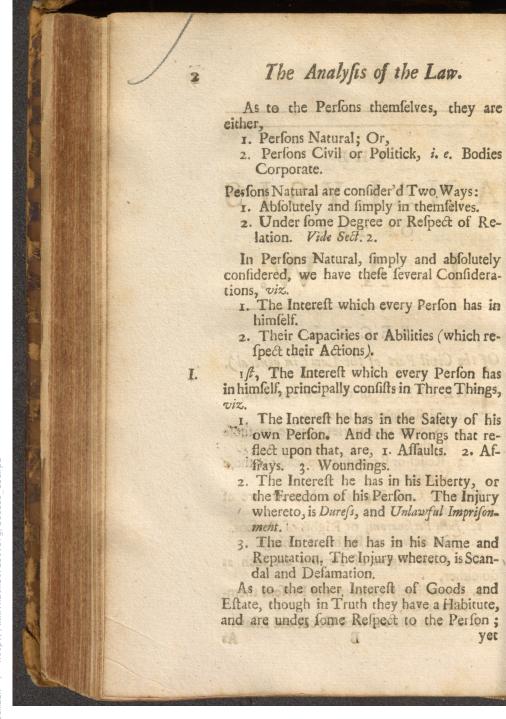
2. Jura Rerum, or Rights of Things.

The Civil Rights of Persons are such as do either,

I. Immediately concern the Persons themfelves: Or,

2. Such as relate to their Goods and Estate.

As



II.

2dly, The Capacity that every Person has; which is a Power that the Law variously assigns to Persons, according to the Variety of certain Conditions (or Circumstances) wherein they are, either To take, or To dispose.

And under this Head, we have,

First, The Capacities themselves, which are especially Two;

r. Capacities which a Man has in his own

2. Capacities which he has in auter Droit; or another Right.

Now Capacities which a Man has in his own Right, are either,

1. To acquire or take.

2. To alien or transfer.

And both these are either,

r. Of Things personal.

2. Of Things real.

The Second Kind of Capacities are in auter Droit, another's Right; as, Executors, Corporations, Cestuy que Use, &c. Whereof hereafter.

Secondly, The various Conditions (or Circumstances) of Persons, with Relation to those Capacities, consisting of,

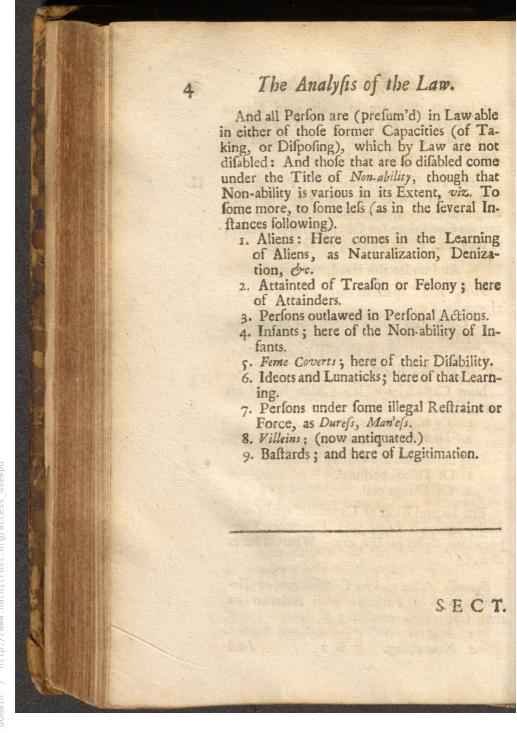
1. Ability.

z. Non-ability.

B 2

And

Generated on 2023-03-20 16:46 GMT / https://hdl.handle.net/2027/uiuc.8395 Public Domain / http://www.hathitrust.org/access\_use#pd



# SECT. II.

Of the Relation of Persons, and the Rights thereby arising.

NOW as to Persons consider'd in respect of Relation, the Rights thereby arising are of Three Kinds, viz.

1. Political.

2. Oeconomical.

3. Civil.

The Political Relation of Persons, and the Rights emergent thereupon, are,

I. The Magistrate.

2. The People or Subject.

The Magistrate is either,

1. Supream.

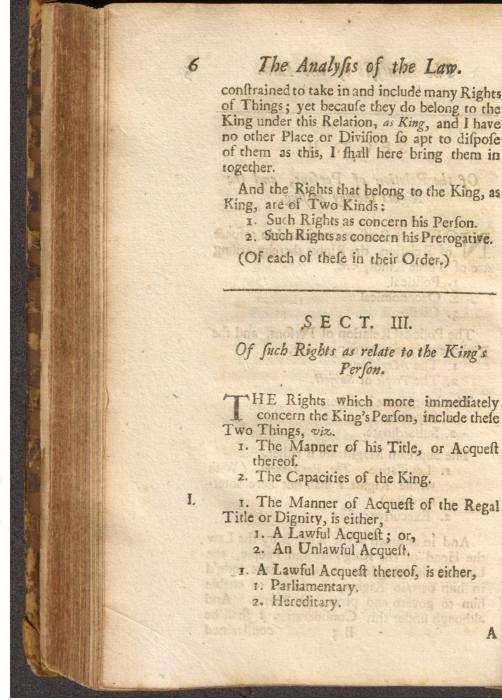
2. Subordinate.

The Supream Magistrate is either,

I. Legislative: The Parliament. (With whose Rights I shall not here intermeddle.)

2. Executive: The King.

And in as much as the King is by the Law the Head of the Kingdom and People, the Laws of the Kingdom, eo Intuitu, have lodg'd in him certain Rights, the better to enable him to govern and protect his People. And although under this Confideration I shall be B 3 constrained



A Parliamentary Acquest of the Regal Title, is either,

r. By Act of Recognition, as 1 Eliz. c. 3. I W. M. Seff. 2. c. 2. 6c.

2. By Act of Limitation, as 7 H. 4. c. 2. 25 H. 8. c. 22. 13 W. 3. c. 6.

An Hereditary Acquest of Title, is by the Municipal Laws and Constitutions of this Kingdom, when the Crown descends to the next of Blood, according to the Laws and Customs of England in Cases of Hereditary Difcents.

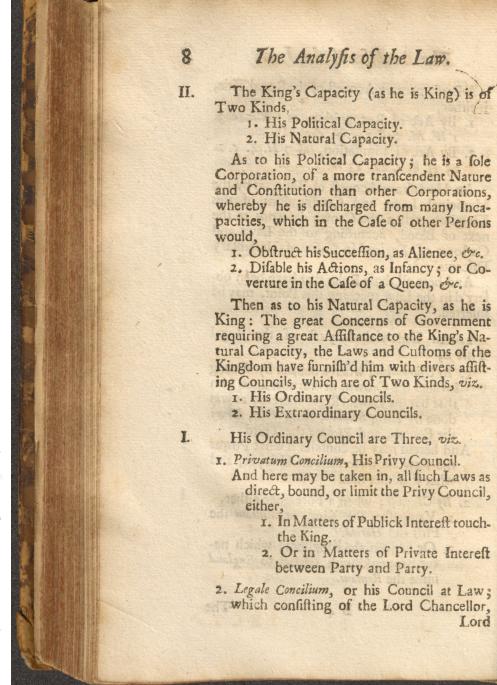
And here all those Rules that have been obferv'd in the Law touching this Point, may be inferted.

- 2. An Unlawful Acquest of the Regal Title is,
  - 1. By Usurpation; when a Subject by Wrong invades the Crown, or intrudes upon him that has the Lawful Right thereto; as was done by King Stephen, King John, Henry the Fourth, and Richard the Third.

And herein may be consider'd what Power the Law allows to fuch an Usurper, and what it denies him.

- 2. By Conquest; when a Foreigner either, I. Vanquishes the King, as William the First did Harold.
  - 2. Or subjects the Kingdom; which never happen'd with respect to England fince the Romans.

B 4 The



- 3. Concilium Militare, His Council in Time of War, or Publick Hostility, viz.
  - 1. In Matters at Land, Earl Constable.
  - 2. In Matters at Sea, the Lord Admiral. The Jurisdiction of whom, Vide post.

The King's Extraordinary Councils are of II.
Two Kinds:

- r. Secular or Temporal.
- 2. Ecclesiastical or Spiritual.

The King's Extraordinary Secular Councils are, 1. The House of Peers; 2. The House of Commons; in their Capacity of Informing, Advising, and Councelling the King in Matters that are,

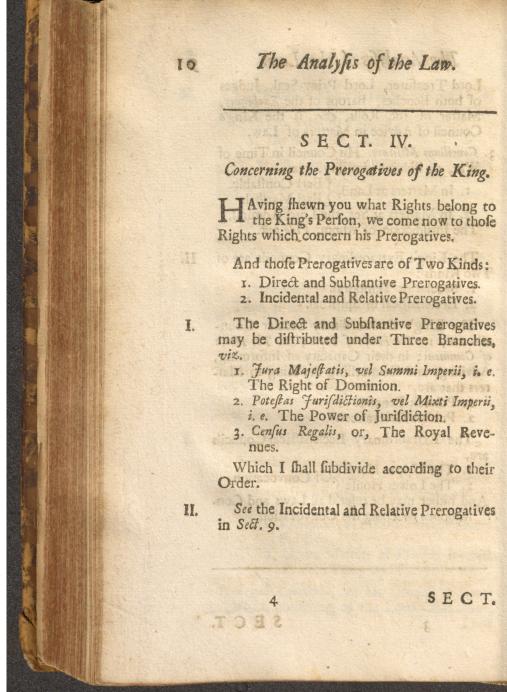
- r. Publick Benefits.
- 2. Publick Grievances.

The Extraordinary Ecclefiastical Councils are,

- 1. The Upper House of Convocation.
  2. The Lower House
- And hither may be refer'd all Laws and Conflitutions touching the Convocation.

3

SECT.



### SECT. V.

Concerning the King's Rights of Dominion or Power of Empire.

THE Jura Summa Majestatis, or Rights of the King's Empire or Dominion, are either,

r. In relation to his own Subjects; or,

2. In relation to Foreigners.

In relation to his own Subjects, they respect,

1. Times of Peace.

2. Times of War.

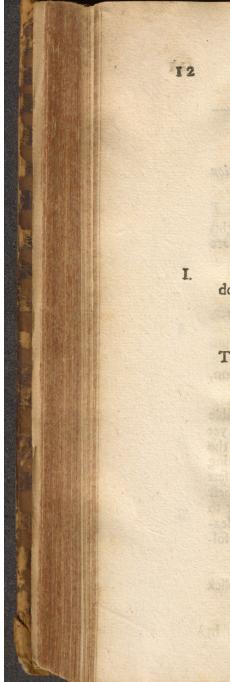
And First, Of the Rights of Dominion, which respect Times of Peace.

These Rights, though they are exercisable also in Times of War and Insurrection, yet seeing they do more immediately respect the Well-ordering of a Kingdom, and preserving its Peace and Tranquillity, I shall here insert them: And though they are various in their Kinds, and some of them seem to refer to the Powers of Jurisdiction, yet I shall endeavour to reduce them to these Eight Heads sollowing, viz.

1. His Rights in relation to the Laws.

2. In relation to Tributes and Publick Charges.

3. In



3. In relation to the Publick Peace of the Kingdom.

4. In relation to Publick Injuries and Oppressions.

5. In relation to Publick Annoyances.

6. In relation to his constituting the great Officers of the Kingdom.

7. In relation to his ordering and regula-

ting Trade and Commerce,

8. In supervising, regulating, and supplying the Desects of others.

I. rft, In relation to the Laws of this King-dom:

1. In the Making of Laws.

2. In the Relaxation of Laws.

As to the making Laws, his Right confifts in Three Particulars:

I. In the making of Statute Laws, or Acts of Parliament; for though the King cannot make such Laws himself without the Consent of both Houses of Parliament, yet no Law can be made to

bind the Subject without him.

2. In the making of Spiritual Laws, or Canons Ecclefiaftical, which, if kept within the Bounds of Ecclefiaftical Conuzance, are admitted here in this Kingdom: As these Laws cannot be made without the King's Consent, so neither can the King ordain such Laws without the Clergy in Convocation affembled.

So that in both these Kinds of Laws, the King's Power of Making, is only a Qualified and Coordinate Power. But,

3. In

3. In making and iffuing of Proclamations, which in some Instances are to be taken for Laws, as in calling Parliaments, declaring War, &c. herein the King's Power is more absolute, as being made by him alone; yet the King cannot by these introduce a new Law, so as to alter or transfer Properties, or impose new Penalties or Forseitures beyond what are establish'd by Statute or Common Law.

And as to his Power in the Relaxation of Laws already made, it respects either,

1. Temporal Laws; which being enacted by Parliament, the King cannot abrogate or annul fuch a Law: But in fome Cases of Penal Laws, he may, in respect of Perfons, Times, or Places, sometimes dispense with them.

Here may come in all the Learning touching Dispensations and Non obstantes.

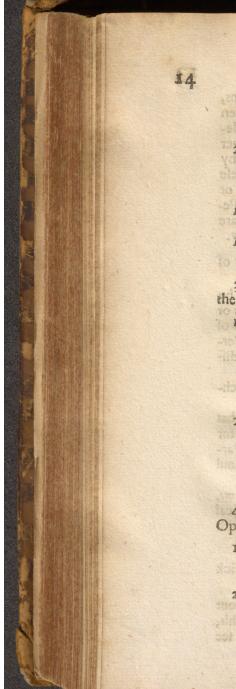
2. Ecclesiastical Laws, wherein the King has a greater Latitude of Dispensation; for if such Laws are not confirm'd by Parliament, the King may revoke and annul them at his Will and Pleasure.

And here all the Learning of Commendams, Dispensationes ad Plura, and all Ecclesiastical Desects and Incapacities dispensed with by the King, fall under Consideration.

2dly, In relation to Tributes and Publick Charges, wherein is confidered,

1. What Charges he cannot impose without Consent of Parliament: And for this, see

Generated on 2023-03-20 16:46 GWT / https://hdl.handle.net/2027/uiuc.8 Public Domain / http://www.hathitrust.org/access use#pd



fee the Statute De Tallagio non concedendo, and divers other Statutes, restraining new Impositions.

2. What Charges he may impose without Consent of Parliament, viz, Reasonable Tolls; as Paavage, Pontage, Murage,

And here may be confider'd the Lawfulness of Tolls, &c.

And of Exemptions 35 By Prescription. from them, 32 By Charter.

3 dly, In relation to the Publick Peace of the Kingdom.

1. In preserving it from being broken:

1. By Inhibitions from going or riding arm'd.

2. By erecting or razing Castles and Fortifications.

3. By prohibiting such Erections by others.

2. In restoring it when broken:

1. By suppressing Affrays and Tumults with Force.

2. By a legal Profecuting and Punishing fuch Affrayors.

4thly, In relation to Publick Injuries and Oppressions.

1. By restraining them by Imprisoment.

And herein consider by whom, where, when, and how, this may be done.

2. By profecuting them in the King's Name;

I. By Indictment.

2. By Information.

3. By

3. By Pardoning them, as to the King's Profecution.

And herein, of Pardons, what may be pardoned, when, how, and by what Words, &c.

sthly, In relation to Publick Annoyances: For the King has the great Care thereof; and the Profecution and Punishment of the same, as far as they are publick, is by Law committed to him.

And this is commonly exercised about Bridges, Ferries, Highways, &c.

Though these Particulars, and some of the foregoing, more regularly come in under Pleas of the Crown, and Criminal Matters, in the Second Part of this Treatise.

6thly, In Relation to his constituting great Officers, viz.

1. Civil Officers, as Lord Chancellor, Treafurer, Privy-Seal, Earl Marshal, Lord Admiral, Judges, &c.

And here may be consider'd,

- 1. The Manner of their Constitution.
- 2. Their Office, Business, or Imployment.
- 2. Ecclesiastical Officers, as Archbishops, Bishops, Deans, Archdeacons, &c.

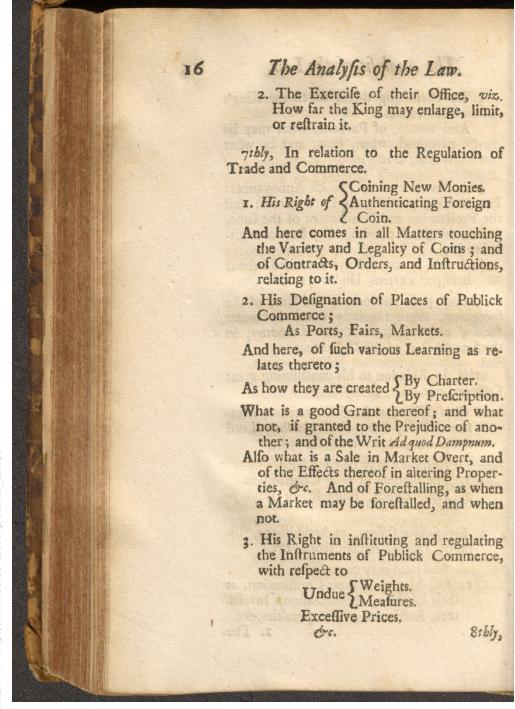
And here may come in,

1. The Manner of their Constitution, as their Election, Consecration, Investiture, Restitution of Temporalties, &c.

2. The

http://www.hathitrust.org/access\_

on 2023-03-20 16:46



ftrates, SBy Writs of Error.

2. Of Ecclefiaffical Magistrates; by Devo-

1. Of Causes, by Appeal to him.

2. Of Presentations, by Lapse.

Thus far of the King's Prerogatives, with respect to Peace: Next, of those that relate to War and Commotions.

These may be term'd Jura Militia, and consist,

1. In raising of Men.

2. In building of Forts.

And regard either,

1. Domestick Insurrections of his Subjects: Or,

2. Foreign Hostilites of Enemies.

I. With Regard to his Subjects,

r. He may raise Men to suppress their

Infurrections by Force.

2. He may punish them by Martial Law during such Insurrection or Rebellion, but not after it is suppress'd.

2. In relation to Foreigners: These Rights are to be consider'd, viz.

1. The Power of denouncing War, and concluding Peace.

C

And



And herein Leagues and Truces may be consider'd, with their various Effects.

Also what shall be said an Enemy.

- 2. The Authorizing of,
  - 1. Publick Envoys:
  - 2. Ambassadors: And,
  - 3. Plenipotentiaries.
- 3. The Power of granting or isluing Letters of Marque and Reprizal.

  And herein consider the Inducements,

Ends, and Effects thereof.

The Power of granting Safe Con-

ducts.

And here of the Uses and Effects thereof.

#### SECT. VI.

Of the Potestas Jurisdictionis; or, The King's Right or Power of Jurisdiction.

Rights of Empire or Dominion: Now we come to the Jura mixti Imperii, or Potestas Jurissidictionis, wherein the King generally acts by his Delegates, Officers, or Representants.

This Potestas Jurisdictionis, or Power of Jurisdiction, seems principally to be of Two Kinds, viz.

a. Extraordinary.

2. Ordinary.

The

I. In commanding home any of his Subjects from foreign Parts;

2. In prohibiting any of his Subjects from going beyond the Seas:

By Proclamation.

2. By the special Writ of Ne exeas Reg.

3. In commanding any of his Subjects to undertake an Office or Dignity within the Realm.

And here the Learning touching these may be inserted, as where, when, and how these Commands or Instructions are to issue; and when, and in what Cases not; what the Penalty if not obeyed, and in what Manner insticted.

The King's Ordinary or Usual Power of Jurisdiction, is of Two Kinds,

r. Ecclesiastical.

2. Temporal or Civil.

I. Ordinary Ecclesiastical Jurisdiction, or rather Jurisdiction touching Ecclesiastical Matters. As this anciently belong'd to the Crown, but was for some Time usurped by the Pope, so by the Statute of 26 H. 8. cap. . it was again restored to the Crown.

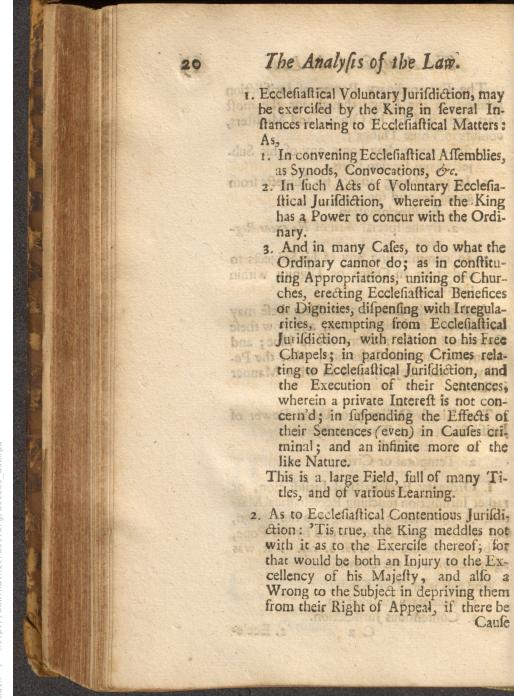
And this is of Two Kinds;

1. Voluntary Jurisdiction.

2. Contentious Jurisdiction.

C 2

I. Eccle-



Cause for the same; for if the King should be the Judge upon the first Instance, the Party cannot afterwards appeal.

And therefore, in Cases of Ecclesiastical Contentious Jurisdiction, his Power is exercised by Way of Interposition, in Three Instances, viz.

1. By his Power of committing

furisdittionem Ordinariam, Et Furisdittonem Delega-

To Commissioners of his own Nomination under the Great Seal.

2. By suspending their Proceedings; which is done, not by his immediate Authority, but the Administration of his Temporal Courts, who, by a Power derived from the King, suspend their Proceedings by Prohibition, if there be Cause.

3. By the last Devolution of Appeal; wherein, though the King himself does not judge in Person, yet he appoints Commissioners under the Great Seal to receive and determine the Appeal.

And thus much of the King's Ecclesiastical Jurisdiction.

Now as to the Temporal or Civil Jurisdi-Aion of the King: This, as well as his Eclefiastical Jurisdiction, is of Two Kinds, viz.

1. Voluntary.

http://www.hathitrust.org/access use#pd

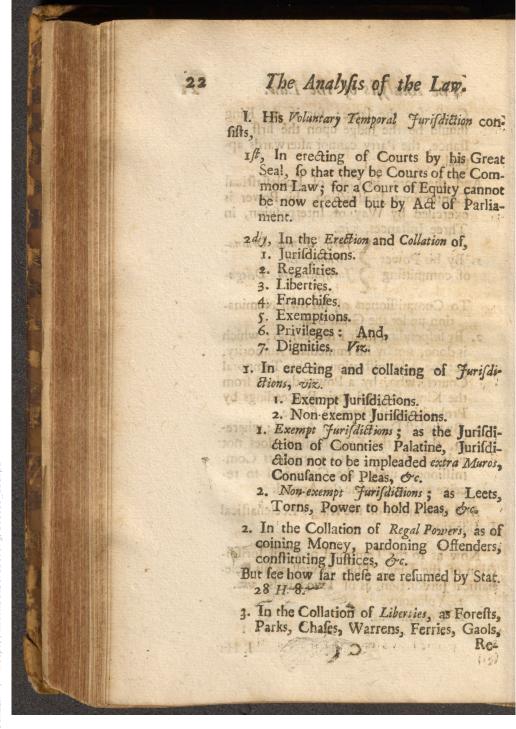
Generated on 2023-03-20 16:46 GMT Public Domain / http://www.hathi

2. Contentious.

C 3

a homello Collection as

I. His

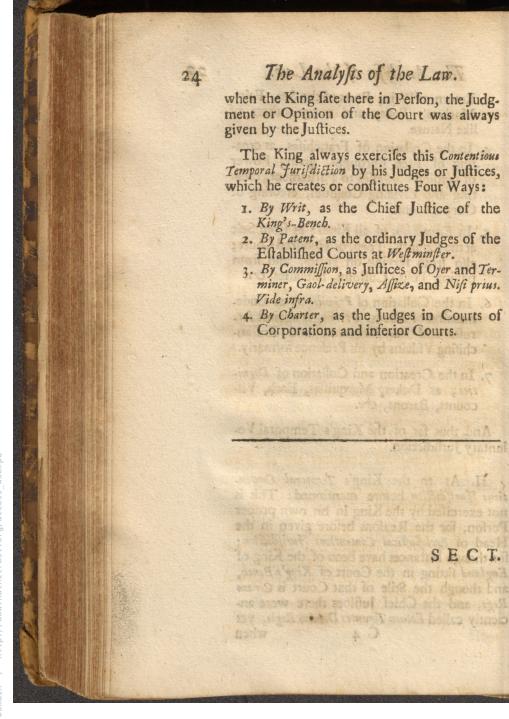


Return of Writs, Ports of the Sea, Fairs, Markets, Tolls, and many others of like Nature.

- 4. In the Collation of Franchises, as creating of Free Boroughs, giving Power of sending Burgesses to Parliament, creating and dividing Counties, erecting of Corporations.
  - 5. In Exemptions of all Kinds; as from Suit at the County, Torn, or Hundred Court; also from serving on Juries, and from paying Tolls, Customs, Subsidies, &c.
- 6. In the Collation of Privileges; as Endenization of Aliens, Privileges against Arrests and Imprisonment, and Enfranchising Villeins by his Presence formerly.
- 7. In the Creation and Collation of Dignities; as Dukes, Marquisses, Earls, Viscounts, Barons, &c.

And thus far of the King's Temporal Voluntary Jurisdiction.

II. As to the King's Temporal Contentious Jurisdiction before mentioned: This is not exercised by the King in his own proper Person, for the Reasons before given in the Head of Ecclesiastical Contentious Jurisdiction; for though Instances have been of the King of England sitting in the Court of King's-Bench, and though the Stile of that Court is Coram Rege, and the Chief Justices there were anciently called Locum Tenentes Domini Regis, yet



Concerning the Census Regalis; or, The King's Royal Revenue.

Tome now to speak of the Census Regalis, or the King's Royal Revenue: And here I shall not say much of his Houses, Manors, Lands, Fee-Farms, or Free Rents, because those are common to him with other Persons; but I shall only speak of his Royal Revenue, or Gensuales Prarogativa, and that Census Regalis, of which the Law takes Notice as of common Right belonging to him, as he is King.

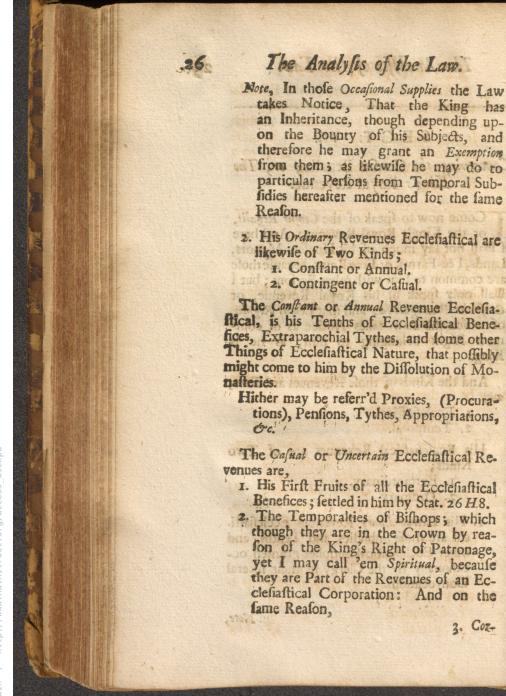
And the Kinds of those Revenues are Two,

- r. Ecclefiaftical.
- 2. Temporal.

His Ecclefiastical Revenues are of Two Kinds;

- 1. Extraordinary.
- 2. Ordinary.
- 1. His Extraordinary Revenues Ecclefiaftical are those Subsidies and Tenths, and other Ecclesiastical Supplies granted occasionally by the Clergy in their several Convocations.

Note,



3. Corrodies also; as being of the Foundation of Ecclesiastical Corporations.

4. And also Lapse it self; which though it be not reckoned a Revenue, because not to be fold, yet it is equivalent to a Revenue; for it yields a Preferment for his Clerk.

### SECT. VIII.

Of the King's Temporal Revenue.

Come now to that Part of the King's Census Regalis which I call Temporal: And this is likewise of Two Kinds;

1. Extraordinary.

2. Ordinary.

1. The Extraordinary Temporal Revenue may be further divided into,

r. The Ancient.

2. The Modern.

The Ancient Temporal Extraordinary Revenues are of several Kinds, as,

1. Hidage, Cornage, Scutage.

2. Aids: Ad Corpus redimendum, Ad filium primogenitum Militem faciendum, Ad filiam primogenitam Maritandam.

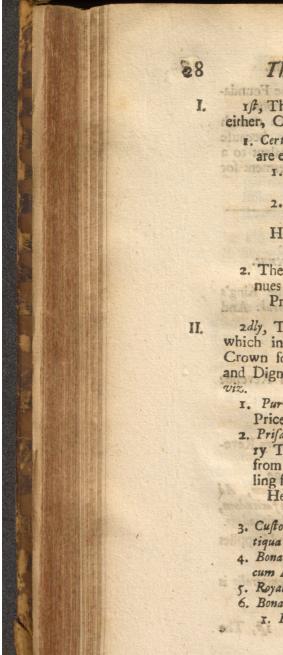
The Modern, are the Subfidies and Supplies granted by Parliaments.

2. The Ordinary Census Regalis Temporalis is also of Two Kinds, viz.

1. Common.

2. Special

if, The



- I. 1st, The Common Census Regalis Temporalis is either, Certain, or Casual.
  - are either, as his Rents and Demefns, which
  - 1. Newly acquir'd by Dissolution, Surrender, Exchange: Or,
    - 2. Ancient; as, Antiqua Dominia Co-ronæ, i. e. Ancient Demesns.

Here insert what they were, what the Tenants Privileges were, &c.

- 2. The Cafual Ordinary Temporal Revenues; as,
  Profits of his Tenures, and the like.
- which in its Original was annex'd to the Crown for the Support of the Kingly State and Dignity; and this is of several Kinds, viz.

I. Purveyance, or Buying at the King's Price; which is fince taken away.

2. Prifage, i.e. One Tun of Wine for every Ten Tuns laden in every Ship; and from Aliens, in lieu thereof, Two Shilling for every Tun.

Here add who are exempted from Prisage, &c.

- 3. Customs, great and small, Magna & Antiqua Custuma.
- 4. Bona Vacantia, as Waiss, Strays, Wreccum Maris.
- 5. Royal Fish, as Whale and Sturgeon.
- 6. Bona Forisfacta, vel Confiscata; as, I. Bona Pelonum, vel Pelonum de se.
  - 2. Bona

- 2. Bona Fugitivorum.
- Bona Utlagatorum, & in Exigendis positorum.
- 7. Royal Escheat; as,
  - 1. Terræ Normannorum.
  - 2. Terræ Alieniginorum.
  - 3. Terræ Proditorum.
- 8. Royal Mines.
- 9. Maritime Increases, by reason of Illuvio Maris.
- 10. Profits of his Courts; as,
  - I. His Fees of the Seal.
    - 2. Fines upon Original Writs.
- 3. Post-Fines, or Fines pro Licentia Concordandi.
  - 4. Fines for Mildemeanors, and those are either Common or Royal.
- or Hundreds, for the Escape of Murderers, Felons, and the like.

.es paring are

and the Judgetters.

Leimness A box entect

- 6. Amerciaments.
- The latter upon Account, not so the former.
- 12. Profits of bis Forests.

to nothall han ariso and mineral

Debters and Accountants, in their

13. Treasure Trove.

SECT

Enigendis

or Substantive Prerogatives of the Crown: Now I come to those that are Dependant and Relative, which are of several Kinds, viz.

### The Prerogatives:

- 1. Of his Presence, in relation to Breach of the Peace, Seisure of Villeins, Arrests, &c.
- 2. Of bis Possessions: That no Man can enter upon him, but is driven to his Suit by Petition. And here of Traverse, Monstrans de Droit, Amoveas Manus, &c. when, in what Cases, and how to be brought.
- 3. Of his Demess. The Rights and Exemptions of Ancient Demess. Vide supra, p.28s
  - 4. Of bis Grants, how to be expounded.
  - s. Of bis Suits; as,
    - r. In what Courts, and Election of Courts.
    - 2. In what Writs.
    - 3. In his Process.
    - 4. In his Pleadings.
    - 5. In his Judgments.
    - 6. In his Executions.
  - 6. Of his Debtors and Accountants, in their Debts and Accounts. 7. In

- 7. In relation to bis Treasure, and of his Officers imployed therein.
- 8. In relation to Persons related to bim; as,
  - 1. His Queen Confort; and here of her feparate Capacity, her Revenue, Aurum Reginæ.
  - 2. His Children; his eldest Son, eldest Daughter, &c.
  - 3. His Ministers attending his Person, or his Courts, or his publick Service.

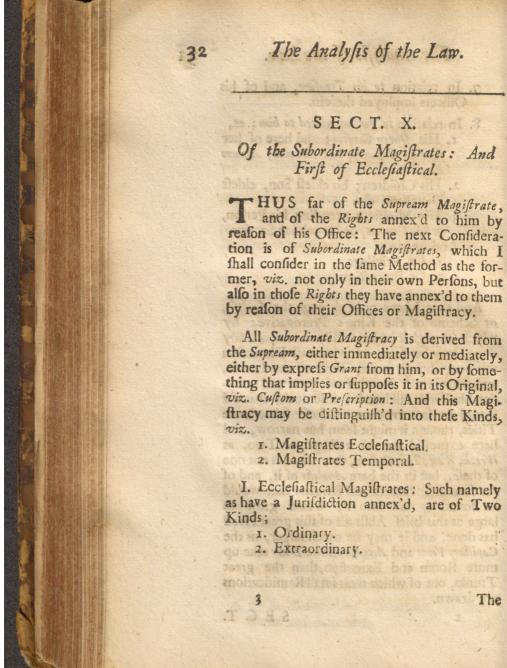
    And herein,
    - I. Of Privilege.
    - 2. Of Protection.

And thus I have gone through the Analysis, or Scheme of the King's Prerogative; by which (though it be but hastily and imperfectly done) may be seen, of what vast Dimension this one, though great, Title of the Law is, and what a vaft Number of great and confiderable Titles fall into it; infomuch, that if I should pursue any one of these subordinate Titles, though it might feem but narrow, and here express'd but by a Word or Two, as Wreck, Waif, Toll, Custom, &c. there is not one of these, but in the bare Analysis of it, and of the several Incidents and Rivulets that would be found to fall into it, would grow as large as this brief Abstract of this great Head has done, and it may be much larger, as the Capillary Veins and Arteries in the Body take up more Room and Extension than the great Trunks, out of which their small Ramisscations are drawn.

I

SECT.

GMT



The Ordinary Ecclesiastical Magistrates are also of Two Kinds, viz.

- annex'd to their Places and Offices primarily and originally, as Archbifhops, Bishops, Archdeacons.
- 2. Such as have their Jurisdiction by Subflitution and Delegation from them, as Chancellors, Officials, Surrogates, Vicars General, Guardians of the Spiritualties, &c.

The Extraordinary Ecclefiastical Magistrates, are certain Persons appointed by the King's Commission for hearing and determining Matters of Ecclesiastical Conuzance (the King being supream Head in Matters Ecclesiastical). And this is either,

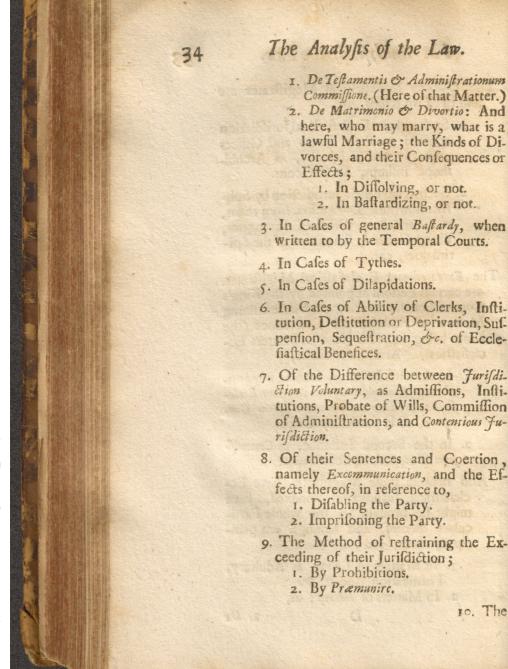
- I. In the First Instance, such as were anciently Commissioners in Matters Ecclesiastical, either ad universalitatem Causarum, or in particular Cases.
- 2. In the Second Instance, as Commiffions of Appeal, and of Review.

And because those Magistrates have Ecclesiastical Jurisdiction annexed, here might be brought in the whole Particulars thereof, and amongst 'em principally these, viz.

- I. In Matters of Crime, as Adultery, Fornication, Incest, Oc.
- 2. In Matters of Interest; as,

D

I. De



ro. The

By Appeal: The Method and Effects thereof.

rr. Of the feveral Courts belonging to their leveral Jurisdictions; as,

To Archbishops, their Court of Audience, Prerogative Court, and Court of Arches.

To Bishops, their several Consistories, and Chanceries, their Chancellors, &c.

12. Their Power of Visitation. To what it extends:

To Corporations Spiritual.

When to Hospitals. When to Universities, &c.

D<sub>2</sub> SECT.

THE Temporal Magistrates are of Three Kinds, viz.

- 1. Military.
- 2. Maritime.
- 3. Civil, or Common Law Magistrates.
- The Military, were the Constable and Marfhal, whose Power (as far as the Common Law takes Notice of it) consisted of Two Parts, viz.
  - Of a Kind of Mixtum Imperium, which principally was for the Prefervation of Peace, and Ordering the Army in Time of War.
  - 2. A Jurisdiction belonging to their Court-Martial: Whereof before.
- 2. The Maritime, is the Admiral, and those deriving Power under him. Their Power likewise consists of,
  - I. A Kind of Mixtum & Subordinatum Imperium over the Officers and Seamen, especially in the King's Fleets and Yards.
  - 2. Potestatem Jurisdictionis, in relation to Matters arising upon the High Sea.

And

https://hdl.handle.net/2027/uiuc.8395964 trust.org/access http://www.hathi GMT Generated on 2023-03-20 Public Domain / http:/

And here of the Admiral's Jurisdiction, and the Remedy, if he exceeds in it;

1. By Prohibition.

2. Action on the Stat. 2 H. 4.

3. The Common Law, or Civil Magistrate; I mean such as are instituted either by the Common Law, by Statute, or by Custom: These, in relation to Things Temporal, are various.

And because these Magistrates consist not only of natural Persons, as they are fuch, but of natural Persons constituted in some Degree of Empire, Power, or Jurisdiction; here will aptly fall in the Diversity. the Jurisdiction and Powers of the several Courts, and of the Officers, both Ministerial and Judicial. These, though I shall not profecute in all their Branches and Extents, yet I shall give some short Account of them, viz.

The Subordinate Civil Magistrates are of Two Kinds:

I. Such as have not only a Civil Power, which I may call Potestatem mixti Imperii, but also have a Power of Jurisdiction.

2. Such as have a Kind of Civil Power, or Mixtum Imperium, but without Jurisdi-Vide Sect. 12. ction.

I. As to the former: The Persons that exercise this Power or Jurisdiction, are called Judges, or

The

Judicial Officers.

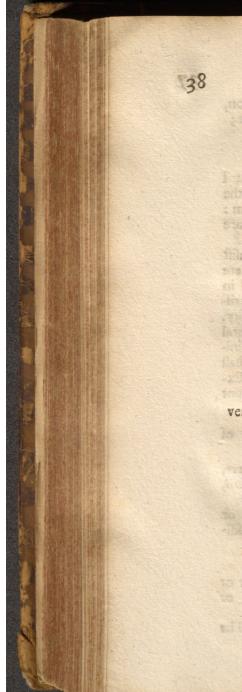
http://www.hathitrust.org/access use#pd

16:46

Generated on 2023-03-20 Public Domain / http:/

UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN

UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN



The Places or Tribunals wherein they exercise their Power, are called Courts. And the Right by which they exercise that Power, is called Jurisdiction.

This therefore yields us these Considerations, viz.

The Courts themselves, what they are, how they are constituted.

What their Jurisdiction is, and the Extent

thereof.

Who the Judges are, and how made, whether by Commission, Charter, Prefcription, Custom, or by Course of the Common Law.

- 1. The Courts are of Two Kinds;
  - r. Courts of Record.
  - 2. Not of Record.

First, Of Courts of Record, there is this Diversity, viz.

- 1. Supream.
- 2. Superior.
- 3. Inferior.

the High Court of this Kingdom is the High Court of Parliament, confifting of the King, and both Houses of Parliament.

- ally, Those Courts I call Superior, are indeed of several Ranks and Degrees, and every one nevertheless are to keep within the Bounds and Confines of their several Jurisdictions by Law assign'd them. And they are,
  - 1. More Principal.
  - 2. Less Principal.

r. The

The More Principal are,
The Courts of the Lords House in Parment.

The great Courts at Sking's-Bench.
Westminster; as, Common-Pleas.
Exchequer.

Ad Communia
Placita.
Ad Placita Forest.

2. The less Principal, are such as are held, Gaol delivery.

Oyer & Terminer.

1. By Commission. Affize.

Nisi prius.

And divers others.

2. By Cu. As the Courts Chancaster. from, or of the Coun-Chester. Charter: Charter.

3. By Vertue of Act of Parliament, and Sewers.

the King's Commifficers of Peace.

And divers of Others.

adly, Inferior Courts of Record. Though there be a Subordination of molt Courts to fome other, yet for Distinction's Sake I shall call those Inferior Courts which are ordinarily so called; as,

Courts Leet.
Sheriffs Torns.

D 4

Secondly,



Secondly, Courts not of County Courts.

Record are divers: As, Hundred Courts.

And others.

But I am not solicitous of pursuing this Matter of Courts and their furisdiction over-largely; because all the Learning of them is already put together in the Tractates of Crompton, my Lord Cook, and others, who have written of the furisdiction of Courts.

### SECT. XII.

Of Inferior Magistrates, Sine Jurisdictione.

I now follows, that somewhat be said of those Magistrates that have a certain Imperium, but without Jurisdiction; and these are called Ministerial Officers.

Some Officers indeed are simply Ministerial, as Clerks and Officers in Courts, Custos Brevium, Prothonotaries, the Remembrancers and Chamberlains of the Exchequer, &c.

But these, though they have a Superintendancy over their Subordinate Ministers, and a Ministerial Administration in Courts of Justice and elsewhere, I shall not meddle with in this Place, but refer them to the several Courts to which they belong.

For

x. The Sheriff of the County, who is the greatest Ministerial Officer; and I therefore call him a Magistrate, because he is a Conservator of the Peace of the County, and executes the Process of the King's Courts.

Here are considerable,
How constituted:
How discharged:
What his Power, his Office, his his Duty.
This is a large Subject: See those that have written of this Office.

- 2. Mayors of Corporations. And here of Heads and Governors of Colleges, &c.
- 3. Constables, and Head Constables.

  These, though they have not any Jurisdiction to hold Conuzance of any Fact, yet are Conservators of the Peace, and have a Kind of Mixtum Imperium relative to it.
- 4. Bailiffs of Liberties, Serjeants of the Mace, and all that have a Power vested in them by Law for the Execution of Justice, are within the Precincts and Extents of their several Offices a Kind of Magistrates; for a Subjection is by Law required of others to them, in relation to that Power wherewith they are invested, and the Execution thereof.

Thus



Thus far of Magistrates both Supream and Subordinate, and the several Rights that are Intuitu & sub ratione Officii, annexed to them.

#### SECT. XIII.

Of the Rights of the People or Subject.

Having gone through the Distribution of Magistrates, I come now to the other Term of Relation, namely, of Subjects.

And the Rights of Subjects are of these Two Kinds, viz.

1. Rights of Duty, to be perform'd.

2. Rights of Privilege, to be enjoy'd.

Duties as are to be paid or perform'd by them; either,

1. To the King, as Supream Executive

Magistrate: Or,

2. To Inferior or Subordinate Magistrates.

The Rights or Duties to be perform'd by the People to the King himself, are,

1. Reverence and Honour, Fidelity and

Subjection.

All which come under the Name of Allegiance; and the Extent of this is declared, and Assurance thereof given, by the Oaths of Allegiance, &c. of Supremacy by x Eliz. of Obedience by 3 fac. x.

2. Pay-

2. Payments of those Rights and Dues, Customs, Subsidies, &c. which either by the Common Law, or by Act of Parliament, are settled on the King.

The Rights to be perform'd to Inferior Maftrates, are,

1. Reverence and Respect to them, according to their Place and Authority.

2. A just Subjection to their lawful Power and Authority, as far as by Law it extends.

2dly, The Rights and Liberties to be enjoy'd by the People, both in relation to the King, and all his subordinate Magistrates, are,

That they be protected by them, and treated according to the Laws of the Kingdom, in relation to,

1. Their Lives.

2. Their Liberties.

3. Their Estates.

And here falls in all the Learning upon the Stat. of Magna Charta, and Charta de Foresta, which concerns the Liberty of the Subject, especially Magna Charta, cap. 29. and those other Statutes that relate to the Imprisonment of the Subject without due Process of Law, as the Learning of Habeas Corpus's, and the Returns thereupon;

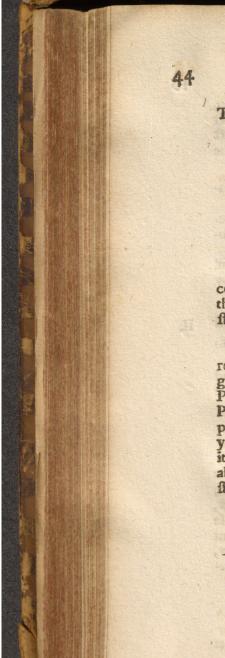
Where the Party is to be bailed.

Where to be remanded. Where to be discharged.

Hither

II.

Generated on 2023-03-20 16:46 GMT / https://hdl.handle.net/ Public Domain / http://www.hathitrust.org/access\_use#pd



Hither also refer those Laws that relate to Taxes and Impositions; as,

The Stat. De Tallagio non concedendo.

The Petition of Right, &c.

Also, the Statutes and Laws concerning

Monopolies.

Commissions of Martial Law.

Commitments by the Lords of the Council.

And concerning the Trial of Mens Lives,
Liberties, or Estates, otherwise than according to the known Laws of the Land.

These, and many more of this Nature, are common Heads of those Liberties and Rights that the People are to enjoy under the Magi-strate.

And thus far concerning the Capita Legis, in reference to the Political Relation of the Magistrate, both Supream and Subordinate of the one Part, and the Subditi or Subject on the other Part: For though Subject, in a more strict and peculiar Sense, is the Correlative of the Prince; yet in a more large and comprehensive Sense, it is a Correlative to any inferior Magistrate also, according to a more limitted and restrained Subjection.

SECT.

#### SECT. XIV.

Of the Rights of Persons under Relations Oeconomical: And first, of Husband and Wife.

Hus far of the Rights of Persons under a Political Relation: Now concerning the Rights of Persons under a Relation Occonomical.

And they are these Three Pairs;

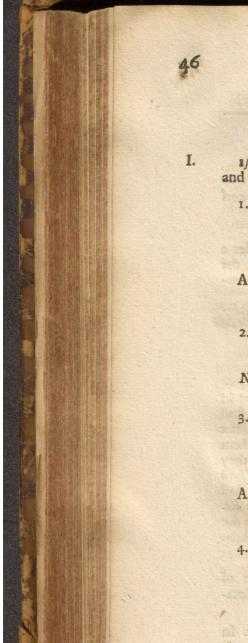
- 1. Husband and Wife.
- 2. Parent and Child.
- 3. Master and Servant.

And I shall here note once for all, That in Oeconomical Relations, as in the former, I shall not only take in the Persons themselves, but also those Jura Rerum that concern them under that Relation; which though they may be of a distinct Consideration under Jura Rerum, yet in this, and what follows, I shall (as before I have done) take in those Jura Rerum that have a Kind of Connexion with the Jura Personarum, under their several Relations.

In the Consideration of this Relation of Husband and Wife, are these Things considerable, viz.

I

r. In



- 1. In relation to the Persons themselves.
- 2. In relation to certain Connexes, Confequences, or Incidents, belonging to Persons under this Relation.
- 1. 1ft, As to the former, these Capita Legis and legal Enquiries fall in, viz.
  - The Persons that by Law may intermarry, the Limits whereof are prescribed by the Stat. 31 H. 8. restraining it to the Degrees prohibited by the Levitical Law.

And yet a Marriage within those Degrees is not void, but voidable by Sentence of Divorce.

2. The Age of Confent to the Marriage: In the Male, Fourteen. In the Female, Twelve.

Note, The Effects of Marriages infra Annos Nubiles.

3. The Differences of Marriages; as,

A Marriage de Facto;

What is requisite to the Constitution

And what Effect it has.

And a Marriage de Jure;

What it is, and the Effects: And how each may be tried.

- 4. What dissolves the Marriage. And here of Divorces, viz.
  - I. A Mensa & Thoro only; as,
    - I. Causa Adulterii.
      - I. Causa Sævitiæ.

2. Vin.

II.

1. Causa Consanguinitatis vel Affinitatis.

2. Causa Præcontractus.

3. Causa Frigiditatis.

And here the Effects of fuch Divorce,
In relation { To the Parties themselves. }
To their Children.

2dly, The Second Thing is, in relation to those Incidents and Consequences that asise upon the Intermarriage, viz.

1. What Things the Husband acquires by the Intermarriage, viz.

Personal Things in Possession. Real Chattels to dispose.

And here,

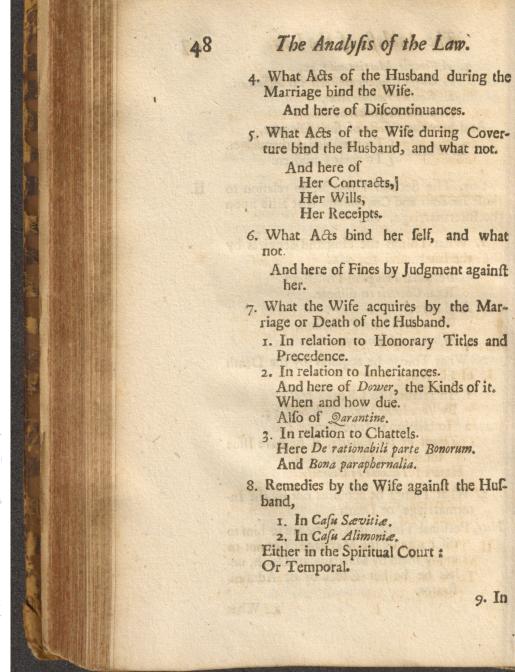
What shall be a Possession, What a Disposition.

- 2. What Things he acquires by the Death of his Wife:
  - 1. In relation to Chattels real;
    By furviving her. Vide Sect. 33.
  - 2. In relation to Inheritances; as, Tenant by the Curtefy, if he have Issue inheritable by her.

Here of Tenants by Courtesy.

- 3. What Things he acquires not by the Intermarriage, or Death.
- Note, Personal Things in Action, are in him to discharge by the Marriage; but not to enjoy them by Marriage, or Death, unless he be her Executor or Administrator.

4 What



to the other in case of Survivorship, as to the Administration of each other's Goods.

#### SECT. XV.

Concerning the Relation of Parent and Child.

I Come now to the Second Oeconomical Relation, i. e. Father, or Mother, and Children; and therein we are to consider,

I. The Father's Interest in the Child:

I. In his Custody or Wardship.

2. In the Value of his Marriage.

3. In his Disposal.

The Father has the Disposal,

1. Of his Child's Education.

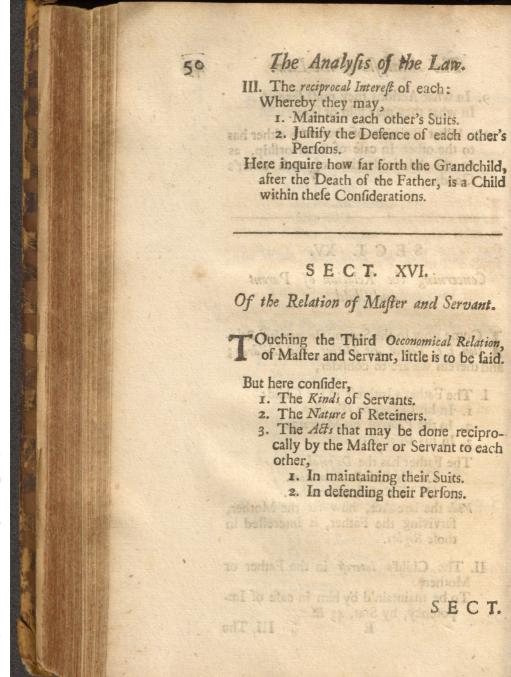
2. Of his Custody to another.

Vide the late Act, how far the Mother, furviving the Father, is interested in those Rights.

II. The Child's Interest in the Father or Mother;

To be maintain'd by him in case of Impotency, by Stat. 43 Eliz.

III. The



## SECT. XVII.

Concerning Relations Civil.

Have done with Relations Political, and also Oeconomical, and therefore now come to those which I call Civil; though, 'tis true, that Term, in a general Acceptation, is also applicable to the Two former Relations.

But in a limited and legal Sense I distinguish Civil Relations into Four Kinds, viz.

- I. Ancestor and Heir.
- 2. Lord and Tenant.
  - 3. Guardian and Pupil.
  - 4. Lord and Villein.

E2 SECT.

### SECT. XVIII.

Concerning Ancestor and Heir.

THIS Relation I made distinct from that of Parent and Child, because many Perfons are Ancestors, as to the Transmission of Hereditary Successions, that are not Parents; and many inherit as Heirs that are not Children to those from whom they inherit. And although the Business of Hereditary Successions will fall in hereafter, when we come to speak of the fura Rerum, and the Manner of transferring of Properties, yet I shall mention it here also. And first, consider,

- I. Who cannot be Ancestor or Heir.
- 1. A Bastard may be Ancestor in relation to his own Children, or their Descendants, but not to any else.

But a Bastard cannot be Heir.

Add here, of Bastards;

Who a Bastard by the Laws of England.

By what Name he may take: By Purchase, &c.

2. In a right ascending Line, the Son is not an Ancestor to transmit to his Father or Grandsather by Hereditary Succession.

3. The

3. The Half blood is an Impediment of Descent, viz.

Of Lands:

Of Lands; Not of Dignities.

II. Who may be Ancestor or Heir.

And here all the Rules of Hereditary Successions may come in: Whether,

I. In Linea Descendente, from Father

to Son, or Nephew.

2. In Linea Ascendence, from Nephew

to Uncle.

3. In Linea Transversali, from Brother to Brother.

## SECT. XIX.

Concerning Lord and Tenant.

UNder the Relation between Lord and Tie

If, The Tenure it self:

What it is; How created;

What the Fruits thereof.

SI. Service.

1. Rent: 32. Charge.

13. Seck.

2. Services of Two Kinds:

1. Of Common Right incident to Te

nures; as,

Fealty: What it is,

E 3

2. Con-



2. Conventional Services; as, Homage; Knights Service, Grand or Petit Serjeanty.

2dly, Certain Perquifites arifing from it; as, Wardship; Marriage;

Marriage; Escuage; Relief:

> And also Escheat, which is either, Ex defectu Sanguinis, for want of Heirs: Or,

Ex Delicto Tenentis, as by Attainder.

And these several Titles may be branched into exceeding many Particulars.

## SECT. XX.

Concerning Guardian and Pupil.

HE Third Sort of Civil Relations are Pupil and Guardian. And herein are considerable,

I. With respect to the Guardian, what and how many Sorts of Custodies there are: As,

And, in some The Mother.

Respects, The Grandsather.

Quære, In what Cases, and to what Intents.

2. Guar.

- 2. Guardian by Nurture.
- 3. Guardian by Socage:
  Who shall be;
  For how long Time.
- 4. Guardian by Knights Service. Vide Sectio prox' supra.
- II. With respect to the Pupil or Heir, is confiderable;
  - I. When he shall be said of full Age:
    - 1. By Common Law.
    - 2. By Cuftom.
  - 2. What he is enabled or disabled to do:
    - I. In relation to Lands.
    - 2. In relation to Goods or Contracts.

And here, Where he shall be bound; Where not.

These may come in here, but more properly before, under Capacity, Sect. 1.

perations, that is, Somewheaters of Chemican

tes iting, who though he has a last Maria

yet to many Purpoles is allo a disc Palei. Corporate, as that been sheedy thewen.

E 4 SECT.

#### SECT XXI.

Of Lord and Villein.

THIS Title is at this Day of little Use, and in Effect is altogether antiquated; and therefore I refer my self herein wholly to Littleton.

#### SECT. XXII.

Concerning Persons or Bodies Politick, i. e. Corporations.

Have done with the Jura Personarum Naturalium, consider'd under their several Relations, Political, Occonomical, and Civil; and therefores now come to Persons Politick, or Corporations, that is, Bodies created by Operation of Law.

I. The Highest and Noblest Body Politick, is the King, who though he be a Body Natural, yet to many Purposes is also a Body Politick or Corporate, as has been already shewn, and shall not now resume. Therefore Bodies Corporate, in respect of the Nature of them, I divide into Two Kinds, viz.

I. Eccle-

- 1. Ecclesiastical.
- 2. Temporal.
- I. Ecclefiaftical Corporations are diffinguish'd in their Constitution, thus; viz.
  - 1. In the Title of it.
  - 2. In the Manner of it.
  - 3. In the Nature of it.
  - 1. In the Title of their Constitution, they are,
    - 1. By Prescription:
    - 2. By Charter; as all new Ecclesiastical Corporations, founded within Memory, are:
  - 2. In the Manner of their Constitution, they are,
    - z. Elective:
    - 2. Presentative.
    - 3. Donative.

And here,

Of Institution.

Induction.

By whom to be made;

And when;

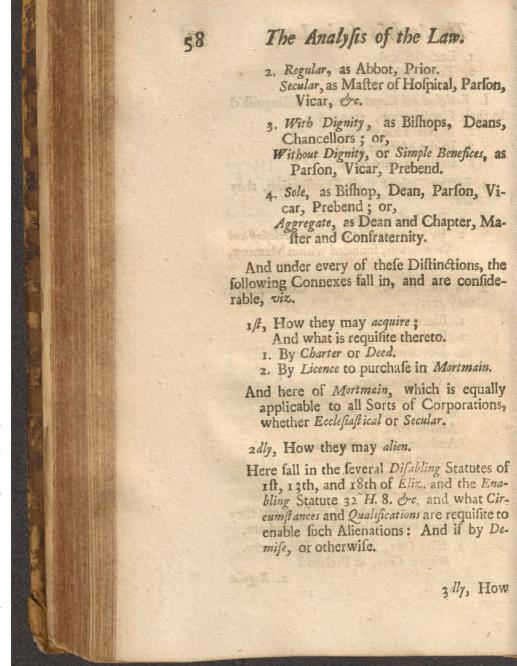
And the Effects thereof.

Also of Lapse, And Devolution; When, and how.

- 3. In the Nature of their Constitution, they undergo many Diversifications, and are,
  - 1. With Care, 2s Parson, Vicar, &c. Without Cure, as Prebend.

2. Regular

I



3 dly, How they are diffoloo'd, and the Effect of such Diffolutions; as,

What becomes of Their Lands;
Their Goods.

And this is likewise applicable to Lay Corporations.

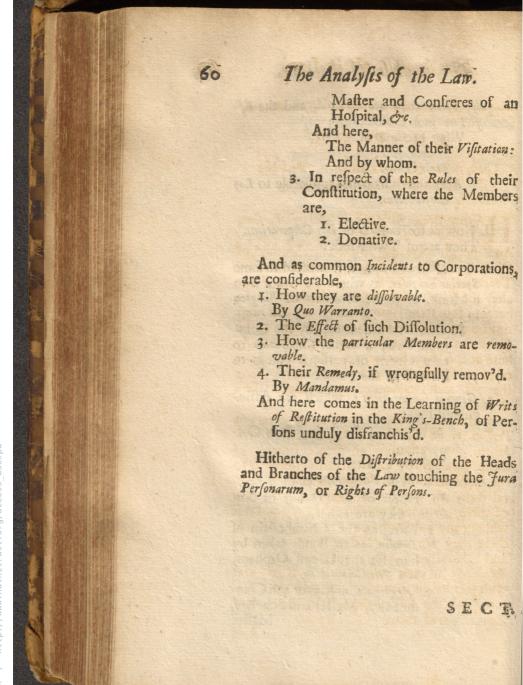
- II. Now as to Temporal or Lay Corporations.
  They are of Two Kinds:
- 1. Special Corporations, i. e. erected to some Special Purposes, as where the Grant is to a Monk, or to the Good Men of Islington in Fee-Farm.

So Church-wardens are, by the Common Law, a Special Corporation to take Goods or personal Things to the Use of the Parish.

- 2. General Corporations; which are distinguish'd thus:
  - 1. In respect of the Title of their Corporation,

1. By Charter.

- 2. By Prescription.
- 2. In respect of their Quality or Condition, they are either,
  - I. Sole, as the Chamberlain of London, as to Bonds taken by him for the Use of Orphans, is a Sole Corporation.
  - Aggregate, as Mayor and Commonalty, Mafter and Scholars, Mafter



## CHAP. XXIII.

Concerning the Jura Rerum, and the General Division thereof.

Having done with the Rights of Persons, I now come to the Rights of Things. And though according to the usual Method of Civilians, and our ancient Common Law Tractates, this comes in the second Place after the Jura Personarum, and therefore I have herein pursu'd the same Course; yet that must not be the Method of a young Student of the Common Law, but he must begin his Study here at the Jura Rerum; for the former Part contains Matter proper for the Study of one that is well acquainted with those Jura Rerum.

And although the Connexion of Things to Persons has in the former Part of these Distributions given Occasion to mention many of those Fura Rerum, as particularly annex'd to the Consideration of Persons under their several Relations, yet I must again resume many of them, or at least reser unto them; and this without any just Blame of Tautology, because there they are consider'd only as incidental and relatively; but here they are consider'd absolutely in their own Nature or Kind, and with relation to themselves, or their own Nature, and the several Interests in them, and Transations of them.

And



And in this Business I shall proceed in the Method following, viz.

1. I shall consider the Things themselves, about which the fura Rerum are conversant, and give their general Distributions.

2. I shall consider the several Rights in those Things, or to them belonging, and the Manner of the Production, Creation, and Translation of those Rights.

3. I shall consider the Wrongs, Injuries, or Causes of Action, arising by Wrongs or In-

juries done to those Rights.

4. I shall consider the several Remedies that relate either to the Retaining or Recovering of those Rights.

First, Therefore I proceed to the Consideration of the Things themselves, and their Distributions. Bracton (and others) following the Civil Law, in his Second Book, cap. 11. De Rerum Divisione, makes many Distributions of Things; but I shall only use such a Distribution as may be comprehensive enough to take in the general Kinds of Things, whereof the Law of England takes Notice, without constning my self to the Distributions of others, but where I find it necessary for my Purpose.

Things therefore in general may be thus difiributed, viz.

I. Some Things are Temporal or Lay.

2. Some Things are Ecclesiaftical or Spiritual. Those

2023-03-20

Those Things that are Temporal or Lay, are of Two Kinds;

- 1. Some are Juris publici.
- 2. Some are furis privati.

ift, Those Things that are Juris publici, are such as, at least in their own Use, are common to all the King's Subjects; and are of these Kinds, viz.

- 1. Common Highways.
- 2. Common Bridges.
- 3. Common Rivers.
- 4. Common Ports, or Places for Arrival of Ships.

And this lets in the various Learning touching those Things. As for Instance:

Who are to repair Highways or Bridges.

1. By Tenure.

- 2. By Custom, or of Common Right.
  Also concerning Nusances in them.
  And in Common Rivers or Ports.
  And how to be remedied.
- But this we shall meet with when we come to Pleas of the Crown.

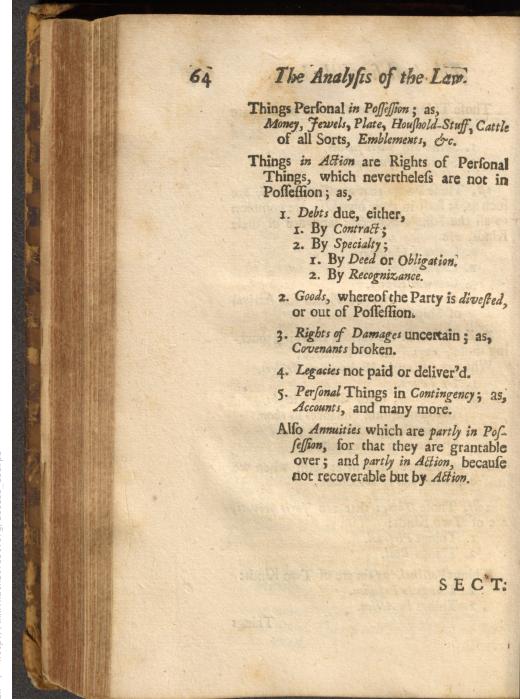
2dly, Those Things that are Juris privati, are of Two Kinds:

- 1. Things Personal.
- 2. Things Real.

Things Personal, again are of Two Kinds:

- I. Things in Possession.
- 2. Things in Action.

Things



## SECT. XXIV.

Concerning Things Real, and their Distribution.

Hings Real are of Two Kinds:

- I. Corporeal.
- 2. Incorporeal.

Corporeal Things Real are fuch as are manu-

And they again are of Two Kinds;

- I. Simple.
- 2. Aggregate.

I. Things Corporeal which are Simple, are generally comprehended under the Name of Lands; which yet are distributed into several Kinds, according to their several Qualifications, and accordingly are demandable in Writs; as,

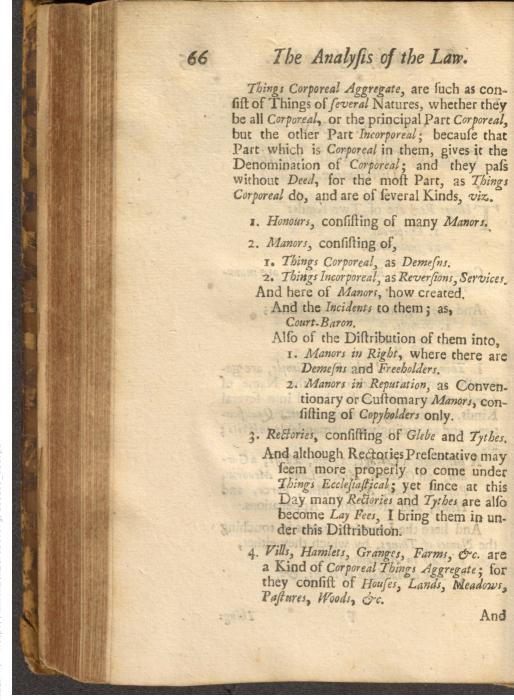
A Messuage, a Cottage, a Mill, a Tost, a Garden, an Orchard, Arable-Land, Meadow, Pasture, Wood, Marsh, Moor, Furze, and Heath, and divers other Appellations.

And here the Learning comes in touching the Names of Things, by which they either,

- 1. Pass in Assurances; or,
- 2. Are demandable by Writs, &c.

F

Things



And here comes in,

I. Parcel, or Nient Parcel.

1. What Parcel in Right.

2. What Parcel in Reputation. And the Effects thereof in Point of Conveyance.

2. All the Learning of Incidents, Appendants, Appurtenances, Oc. as,

1. What may be appendant, appurtenant, regardant.

2. How and where they pass by general Words, without naming them

II. Things Incorporeal are of a large Extent, out may be reducible unto those Two general Sinds, viz.

1: Things Incorporeal, not in their own Nature, but so called in respect of the Degree or Circumstance wherein they stand; as,

> Reversions. Remainders.

The Estate of Lands.

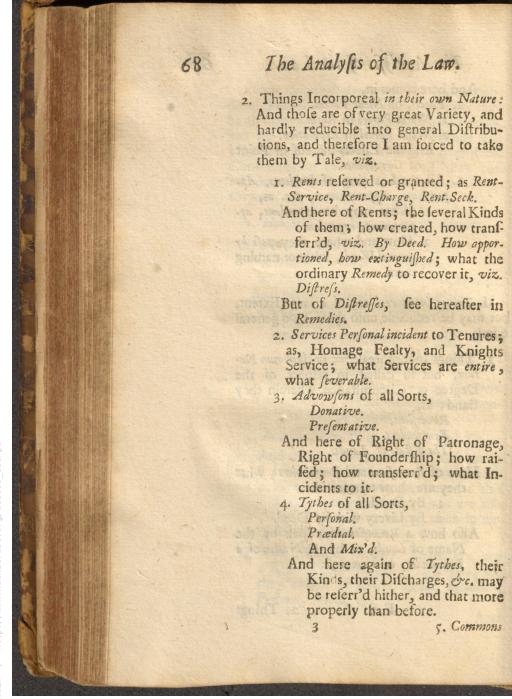
Here of Reversions and Remainders; what they are, how transferr'd.

1. By Deed.

2. By Livery without Deed.

Also how a Reversion may pass by the Name of Lands, or by the Name of a Remainder, or è converso,

F 2 dec 2. Things



http://www.hathitrust.org/access use#pd Generated on 2023-03-20 Public Domain / http:/ 5. Commons of all Sorts; as Common of Estovers, and of Pasture, appendant and appurtenant; for Cattle certain, and for Cattle Jans Number, Seperabilis Pastura; and what may be done by those Commoners,

1. In relation to other Commoners by Admeasurement.

2. In relation to the Lord by Di-

stress or Action.

And all the Learning hereof may be added here, though we shall meet with it again hereafter.

6. All Kinds of Proficua capienda in alieno solo; as Herbage, Pawnage, &c.

7. All Kinds of Pensions, Proxies (Procurations), Oc.

8. Offices of all Sorts.

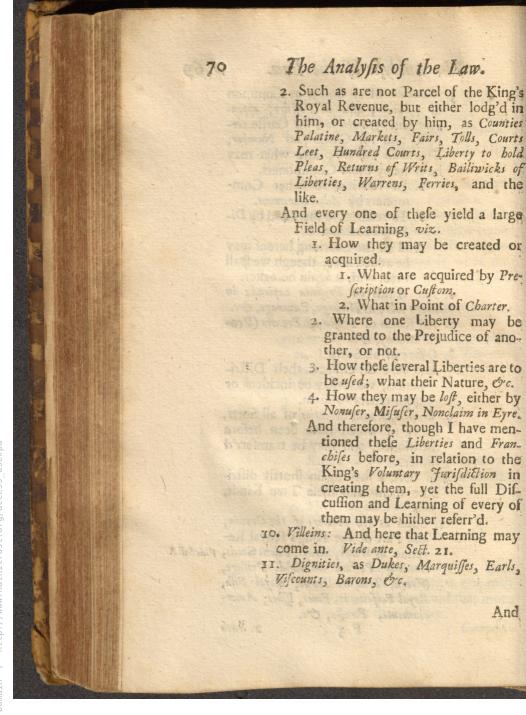
And here of Offices, their Diffribution, what may be incident or appurtenant to them.

9. Franchises and Liberties of all Sorts, many of which have been before mentioned, and may be transferr'd hither.

And here I shall again shortly distribute them into these Two Kinds, viz.

I. Such as are Flowers of the Crown, and Part of the King's Royal Revenue, as Waifs, Strays, Felons Goods, Vide Sett. 8. Goods of Persons outlaw'd, Prisage, Wreck, Treasure Trove, Royal Fish, Royal Forfeitures, Fines, Isues, Amerciaments, Forests, &c. F

2. Such



And thus far touching Incorporeal Real Things Temporal.

Their common Incident is, That they pass not from one to another without Deed. And to these several Titles, may be reduced all the Learning of each Particular.

## SECT. XXV.

Concerning Things Ecclefiastical or Spiritual.

Have done with Things Temporal, and come to those that are Ecclesiastical or Spiritual: And though the Possessions of Ecclesiastical Persons, the Offices, Courts, and Jurisdictions Ecclesiastical, and Tythes also, might come in under this general Head; yet because these Things sall in the former Title under Temporal Things, and for that the Rule for them both is the same, I shall not need to repeat it here, only I will remove what before came under the Title Corporations, because it may be thought to come in more conveniently in this Place.

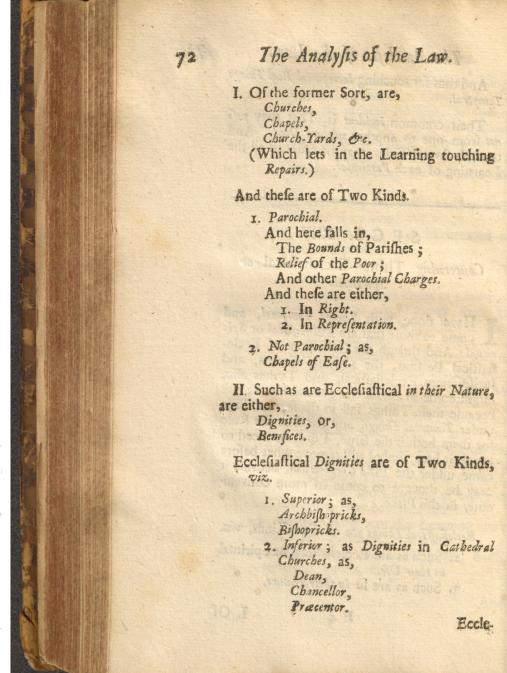
Ecclefiastical Things are of Two Kinds, viz.

- 1. Such as are Ecclesiastical or Spiritual in their Use.
- 2. Such as are so in their Nature.

F 4

I. Of

13000



- Parsonages, Vicarages, &c.
- 2. Without Cure; as, Prebends, Ecclefiastical Hospitals, &c.

And here the Learning touching those Matters, and also touching Vacancy by Pluralities.

Also of Appropriations, Common Dispensations, Qualifications.

And Vacancy, by Resignation, Deprivation, Cession.

So much touching Ecclesiastical Benefices not observable supra, Sect. 22.

SECT.



## S E C T. XXVI.

Of the Nature and Kinds of Properties.

Itherto of the Kinds of Things, I come now to confider the Nature and Kinds of those Properties or Interests that Persons have, or may have in them.

The Rights of Things are distributed according to the Nature of the Things themfelves; which are,

- I. Personal.
- 2. Real.

The Right of Things Personal is called Propriety, and under that will come these Considerables, viz.

- I. The Kinds of those Rights.
- 2. The Capacities wherein they are held.
- 3. The Manner of their being acquir'd or transferr'd.
- I. The Kinds of those Rights or Proprieties of Things are Three, viz.
  - 1. A Propriety of Action, which is relative to all Things in Action.
  - 2. A Propriety in Possession.
  - 3. A mix'd Propriety, partly in Action, and partly in Possession.

· If,

Ist, Touching the Property of Things in

This is an Interest by Suit or Order of Law, to demand the Things themselves, or Damages for them.

But of this hereafter, when we come

to Wrongs or Injuries.

2dly, Touching Propriety in Possession: It is either,

1. Simple and Absolute.

2. Special or Particular.

- I. Simple or Absolute Property, is when a Man has it, and no other has or can have it from him, or with him, but by his own Act or Default.
- 2. The Special or Particular Property is of Two Kinds, viz.

I. Such as some other has a concurring In-

terest with him therein.

2. Such wherein, though no other has any concurring Interest with him, yet his Property is but temporary, and vanishes by certain Accidents or Occurrences.

The former Kind of those Special or Particular Properties are very various, viz.

I. The Interest that a Man has by Bailment.

2. The Interest he has in Goods pledged: Or,

3. The Interest he has in Goods conditionally granted.

4. The



4. The Interest he has in (Things distrain'd, or) a Distress.

5. The Interest of Goods demis'd for a Term.

The Second Kind of Special Property, wherein though no other has a Property, nor
indeed are the Things in themselves capable of any (certain or sure) Property,
yet a Man by certain Contingents or
Accidents may have a Temporary Property
in them; such are Things Fere Nature,
wherein a Temporary Property may be
lodg'd upon these Grounds, viz.

I. Ratione Impotentiæ, as in Young Birds

in a Nest upon my Tree.

2. Ratione Loci, as Conies and Hares

while in my Ground.

3. Ratione Privilegii, as of Birds or Beafts of Warren while within my Warren, and Swans within my Liberty.

3 dly, Touching Mix'd Properties, i. e. partly in Action, and partly in Possession: They are Annuities; wherein a Man may have a Personal Inheritance.

Thus far of Property or Right in Things Personal.

II. The Second Thing propounded, is the Capacity wherein a Man may have them; and that is double:

I. In Jure proprio.

2. In Jure alterius.

And

And this latter is of Two Kinds;

1. As a Body Politick.

2. As Executor in Right of the Teftator.

III. The Third Thing propounded is, The Manner of the Acquest, or Translation of Property. And because both of these will be much of one Consideration, I shall join them in the Course of my Distributions.

Personal Things, either in Action or Possession, may be acquir'd or transferr'd Three Ways:

1. By Act in Law.

2. By Act of the Party.

3. By a Mix'd Act, confisting of both.

SECT.

### SECT. XXVII.

Of Acquisition of Property by Act in Law.

- I. THIS Acquisition by Act in Law may be many Ways, viz.
  - I. By Succession, whereby Properties are transferr'd to the Successors of such a Corporation by Law or Custom, which has a Power to receive Personal Things in a Politick Capacity; as

1. A Sole Corporation, by Custom.

- 2. An Aggregate Corporation, by Com-
- 2. By Devolution, viz.

To the Executor.

To the Ordinary.

To the Administrator.

To the Husband by the Intermarriage, i. e. As to Personal Things in Possession, but not as to Personal Things in Action.

- 3. By Prerogative, whereby they are given to the King, or to such as have the King's Title by Grant or Prescription; as, Waif, Stray, Wreck, Treasure Trove.
- 4. By Custom; as in the Case of Heriot Cufrom, and Heriot Service, Mortuaries, Heir Looms, Foreign Attachment, Assignment of Bills of Exchange;

5. By

5. By Judgment, and Execution thereupon, which in the Case of the King extends as well to Things in Action that have a Certainty in them (as Debts), as to Things in Possession. But in the Case of a Common Person, only as to Things in Possession.

And this by, I. Fieri Facias : Or,

2. Elegit.

6, By Sale in Market-Overt.

#### SECT. XXVIII.

Acquisition of Property by Act of the Party, and Mix'd Act.

II. A Cquistion of Property by Act of the Party, may be Three Ways, viz.

1. By Grant.

2. By Contract.

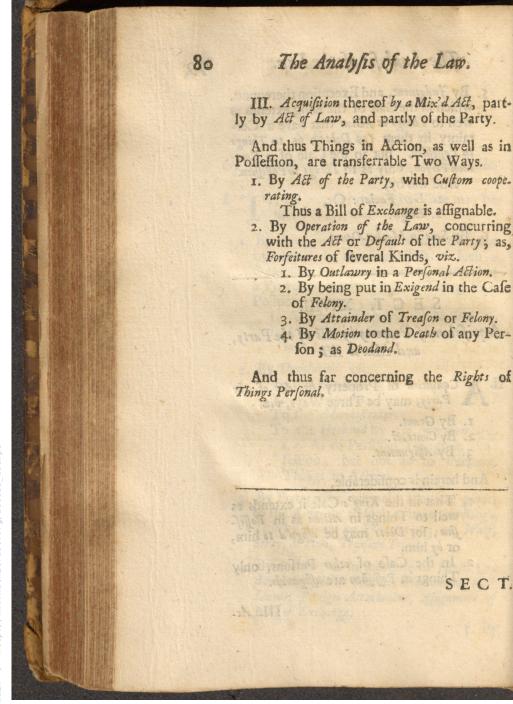
3. By Assignment.

### And herein is considerable,

1. That in the King's Case it extends as well to Things in Action as in Possession; for Debts may be affign'd to him, or by him.

2. In the Case of other Persons, only Things in Possession are assignable.

III. Ac.



# SECT. XXIX.

Concerning the Rights of Things Real.

Now come to the Rights of Things Real: And herein I shall hold this Method.

I shall consider the Rights of the Things themselves, or the various Interests and Estates in Things Real, viz.

1. The different Nature of Estates or Interests in Things Real, in relation to,

1. Their Nature and Extent.

1918 2. Their Limitation or Qualification.

2. The different Relation of those Estates, with respect to the Possession.

3. The different Qualities thereof in respect of the Persons having the same.

Vide Sect. 32. O pag. 91.

First, As to the Difference of Estates, with relation to their Nature and Extent, they will be divided into,

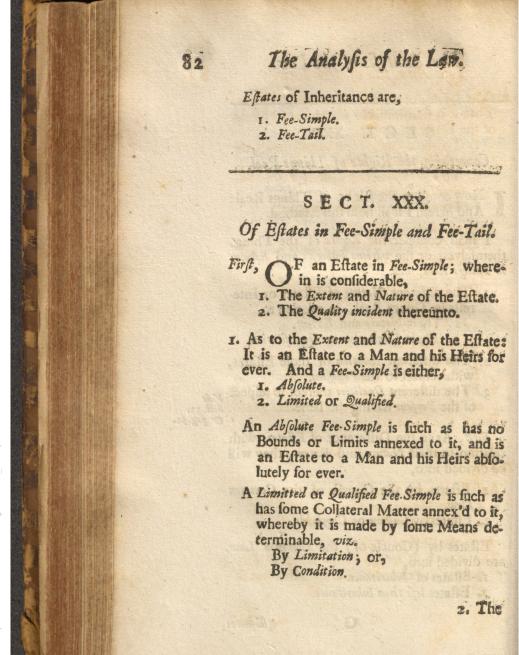
- I. Estates by the Course of the Common
- 2. Estates by Custom or Copyholds.

Estates by (Course of) the Common Law are divided into,

- 1. Estates of Inheritance.
- 2. Estates less than Inheritance.

G

Estates



# The Analysis of the Law.

2. The Quality of an Estate in Fee-Simple is, That it is transmissable in the very Nature of the Estate:

1. To the Successor in Bodies Corporate by

a Right of Succession.

2. To the Heir in the Case of Persons natural by Descent.

3. To any other Person by Alienation.

As to the former of these,

The Nature of the Corporation directs the Rule of Succession.

As to the Second,

The Rules of Descents are directed,

1. By Custom.

2. By Common Law.

1. By Custom; as,... To all the Sons in Gawelkind.

To the Youngest in Burrow English.

2. By the Common Law, wherein the Rules of the Common Law give the Direction. But of this more at large in Sect. 33.

The Second Estate of Inheritance is Fee-

And herein are likewise observable.

1. The Nature and Extent of the Estate.

2. The Incidental Qualities thereof.

1. As to the First of these,

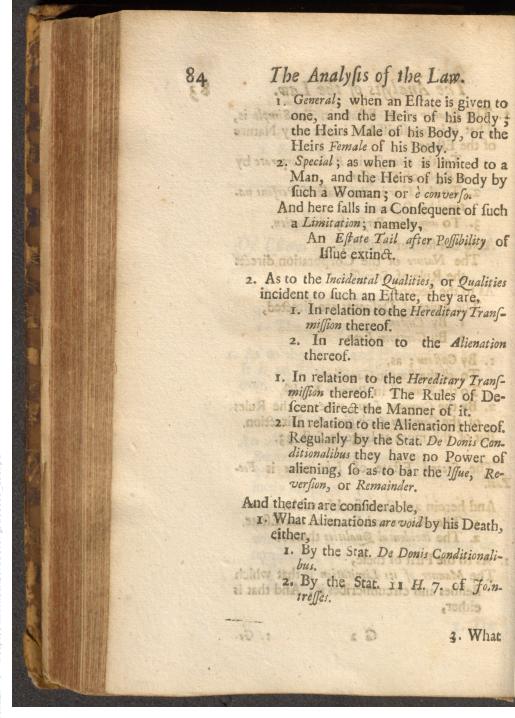
adW .

The Manner of its Limitation is that which defines and circumferibes it: And that is either,

G 2

1. Ge-

83



2. What Alienations are voidable only. viz.

By Entry. By Action. By Suit.

And therein of Discontinuances.

3. What Alienations bind the Issue in Tail, but not the Revertioner, viz.

1. A Fine with Proclamations, by

Stat. 4 H. 7.

2. A Lease for Three Lives, &c. and accustomable Rent, by Stat. 32 H. 8.

2. Attainder of Treason, by Stat. 33 H. 8.

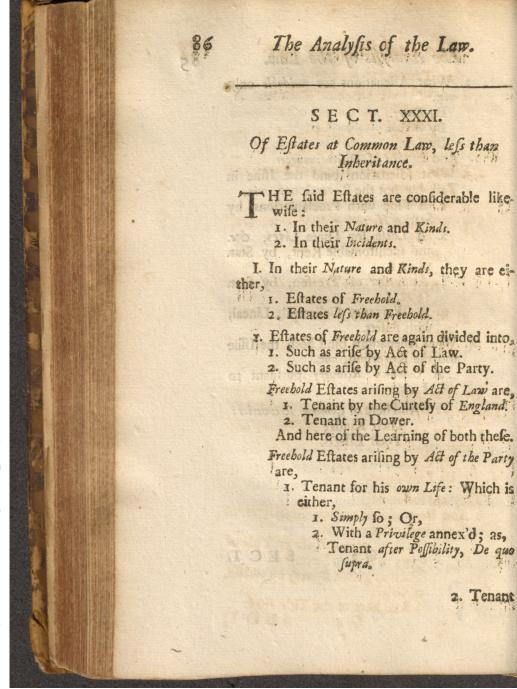
4. A Warranty Collateral, Lineal, with Affets.

4. What Alienations bind both the Issue and the Reversion, viz.

A Common Recovery pursuant to Law.

And here of Common Recoveries: Their Kinds: Their Effects.

SECT.



General.

Special.

As also of Estates limited to

As also of Estates limited to one, and his Heirs, Pur auter vie.

- 2. Estates less than Freehold are of Two Kind:
  - I. Certain.
  - 2. Incertain.
  - z. Estates less than Freehold certain are, Leases for Years.

And here also of Leases by Stat.

Merchant, Stat. Staple, and Elegit.

And likewise the Learning of Extents,

Re-extents, Audita Querelas, &c.

2. Incertain Estates less than Freehold are, Tenants at Will

These are determinable at the Will of either Party.

II. The Incidents to all these particular Estates, except Tenancy at Will, are these, viz.

They are transferrable from one to another, unless particularly restrained,

By Condition; or, By Limitation.

They are forfeitable.

And here of the various Forfeitures of particular Estates; as,

I. Such as give a Right or Title of Entry to him in Reversion.

2. Such as give a Remedy by Action, as, Wast.

And here of the Title Waft.

G4 SECT.

### SECT. XXXII.

2. Tround Par inside vier

Of the Distinction of Rights of Estates, with relation to the Possession.

Vide Sect. 29. d to one.

Aving gone through the several Kinds and Natures of Estates both at Common Law and by Custom, I come now in the second Place to the various Relations that these Estates have to the Possession; which gives several other Determinations unto the Rights that Persons have to them.

These Estate before mentioned, and the Rights thereupon, are either,

1. Such as are in Possession.

And here of the Title Wife.

- 2. Such as are not in Possession.
- r. The Right of Estates in Possession, is where there does interpose no Estate or Interest between the Right and the Possession of the Thing; as,

Tenant for Life in Possession. Tenant in Fee in Possession, &c.

- 2. The Rights that are not immediately in Possession, are either,
- ment expects the Accomplishment of something else that must antecede

as, Walt.

2. Where

- 2. Where the Right or Estate perchance is immediately in the Party; but the Possession thereof is removed or detain'd by another.
- I. As to the former of these, they are of feveral Kinds, viz.
  - 1. Reversions; which though a present Interest, yet stands in a Degree remov'd from the Possession till the particular Estate be determined.
  - 2. Remainders.
  - 3. Future Interests of Teams for Years.
  - 4. Contingent Interests; or Interests or Estates limited to take Place upon a precedent Condition.

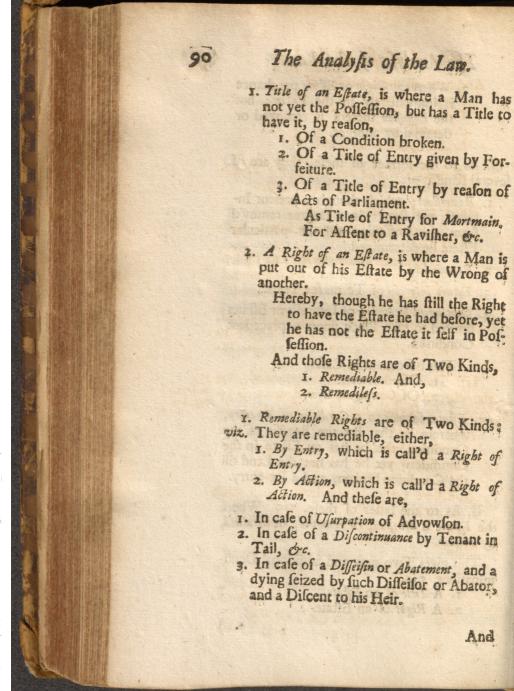
This is frequent in Cases,

- 1. Of Accrewers.
- 2. Of Contingent Uses.
- 5. Estates subject to a Condition of Re-entry, wherein he that has the Benefit of the Condition, tho' he has an Estate in the Condition, yet he has not the Land till the Condition broken, and a Re-entry.
- II. As to the latter of these, viz. Where the Estate is divested, or removed, or detained, by another.

This gives Two new and additional Denominations, viz.

- 1. A Title of an Estate.
- 2. A Right of an Estate.

1. A



And here all the Learning of Entries Congeable;
Discents que Toll Entry;
Continual Claim;
Infants, when bound, &c.

2. Remediless Rights are where the Remedy is taken away, though the Right remains;

Which may be either,

I. By Warranty, Collateral or Lineal, with Affets.

And here comes in the Learning of Bars and Rebutters by Warranty.

- 2. By Nonclaim upon a Fine.
- 3. By Limitation of Time. By the old, or the later Statutes, introduced in fuch Cases, viz. 32 H. 8. 21 Jac. 1.

III. The Third Thing I propounded, was vide the different Qualities and Relations in re- Sect. 29. gard of the Persons having the Estate.

And these are,

- 1. Sole Tenants.
- 2. Jointenants.
- 3. Tenants in Common.

And here comes in the Learning of each of these.

and alone , opening betryet when SECT.

# CHAP. XXXIII.

Touching Acquisition and Translation of Estates in Things Real. First, By Act in Law.

THUS far have I gone in a Description of the various Natures, Relations, and Kinds of Estates; and now I come to the Manner or Means of their Acquest or Translation.

And an Estate or Interest is thus translated, viz.

I. By Act of Law.

2. By Means of the Party. Vide prox' Sea.

- 1. By Act of Law there is a various Acquisition of Things, according to their several Natures, viz.
  - I. Of Things Real that are Chattels.
  - 2. Of Things Real that are Freeholds.
  - 3. Of Things Real that are Inheritance.
  - I. As to the Acquest of Chattels by Act of Law; though they are Real, they are of the same Kinds as Things Personal. Therefore vide ante Sect. 27.

Only with this additional Exception, That Chattels Real go not to the Husband immediately by the Marriage, unless he

furvives the Wife.

2. As

2. As to the Acquest of Estates of Freehold by Act in Law, there is only the Title Occupancy which here comes in.

And that is either { 1. General. 2. Special.

3. As to Matters of Inheritance, the Titles of Acquests therein by Law seem to be of Two Kinds, viz.

I. Such as is applicable to all Estates of Inheritance, viz. Descent.

2. Such as is applicable only to the Acquest of Estates in Fee-Simple.

I. The Act in Law applicable to the Acquest of all Estates of Inheritance, Descent, or Hereditary Succession.

And this is either,

1. Of an Estate Tail.

2. Of an Estate in Fee-Simple.

Touching the Descent of Estates Tail; the Manner of the Limitation directs the Descent as aforesaid.

Touching the Descent of Fee-Simple, Two Things are considerable, viz.

I. The Rules of the Descent it self.

2. The Burthen or Charges that lie upon the Heir that takes by Descent.

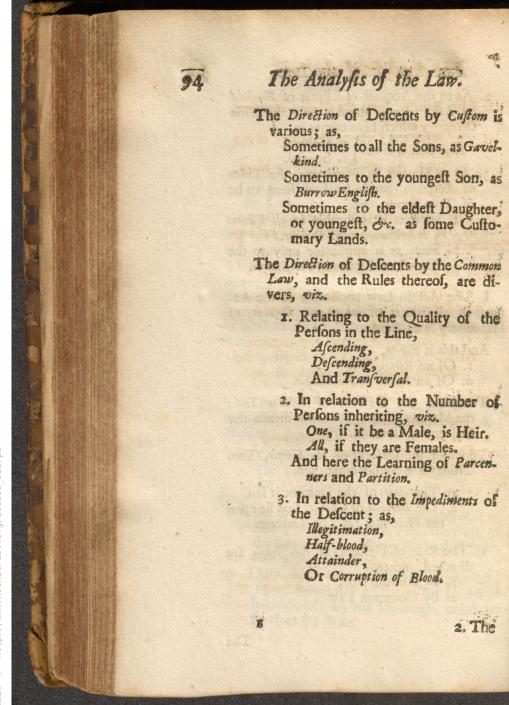
1. The Rules of Descents of Fee-Simple are directed, either,

1. By Custom; or,

2. By Common Law.

The

oll s



1. With the Debt or Covenant of the

Ancestor.

2. With the Warranty of the Ance-

II. The Second Kind of Means of Acquifition by Act in Law, refers only to Estates in Fee-Simple; as,

First, By Prescription or Custom; which is,

1. Of Things in Gross and Substantive :
And thus a Right of an Incorporeal Inberitance is gainable.

2. Of Things incident and appurtenant.

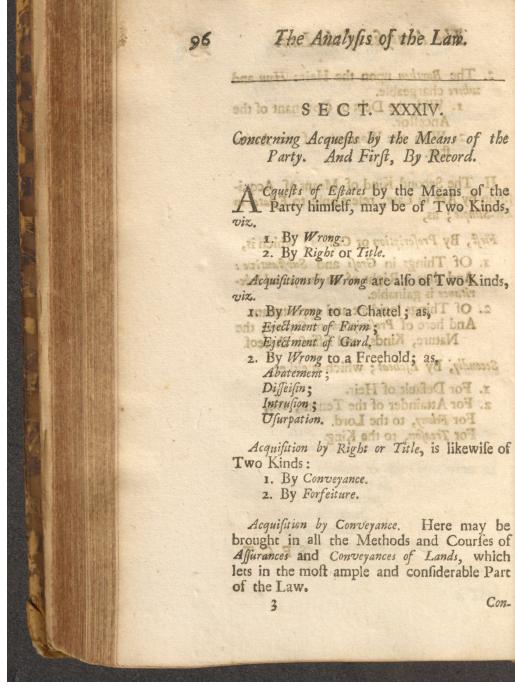
And here of Prescription or Custom; the
Nature, Kinds, and Effects thereof.

Secondly, By Escheat; which is either,

r. For Default of Heir.

2. For Attainder of the Tenant, viz. For Felony, to the Lord. For Treason, to the King.

SECT



Conveyances therefore are of Two Kinds:

- 1. By Matter of Record.
- 2. By Matter in Pais.
- 1. By Matter of Record, they are either,
  - 1. By Fine.
  - 2. By Common Recovery,
  - 3. By Deed enroll'd.
  - I. By Fine; where comes in all that Learning, viz.
    - r. Their Kinds.
    - 2. Their Effects.

Their Kinds are in general Two, viz.

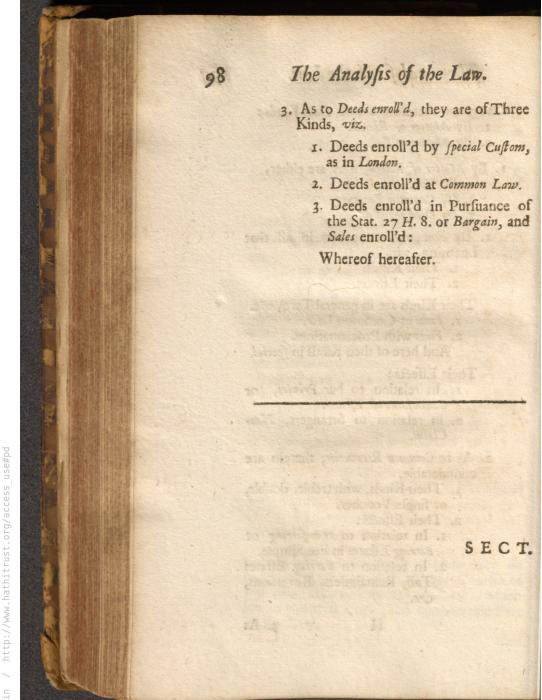
- 1. Fines at Common Law.
- 2. Fines with Proclamations. And here of their Kinds in special.

Their Effects;

- r. In relation to bar Privies, Conveyance of Estates.
- 2. In relation to Strangers, Non-Claim.
- 2. As to Common Recoveries, therein are confiderable,
  - 1. Their Kinds, with treble, double, or fingle Voucher.
  - 2. Their Effects:
    - 1. In relation to transferring or barring Estates in Fee-Simple.
    - 2. In relation to barring Estates Tail, Remainders, Reversions, drc.

H

3. As



Concerning Conveyances by Matter in Pais. And First, Of Deeds.

Onveyances by Matter in Pais are of Two Kinds, viz.

I. Conveyances without Deed.

2. Conveyances by or with Deed.

I. Conveyances in Pais without Deed, are either,

I. Of Chattels; or,

2. Of Freeholds.

1. Of Chattels; as, Leases, or Extents of Land, and may be either,
By Grant or Assignment;

By Parol;

By Exchange; Quære.

2. Of Freeholds of Lands by Livery. Of this hereafter.

II. Conveyances in Pais with or by Deed. Here we may consider,

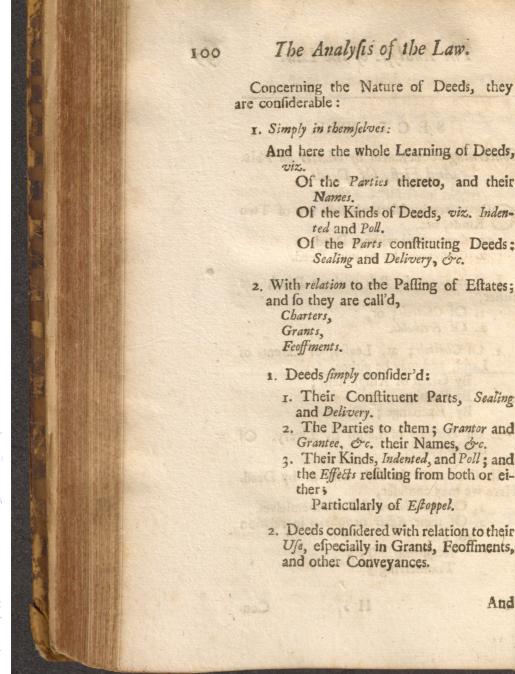
1. Of the Nature of Deeds themselves.

2. Of their Effect or Efficacy in relation

Acquiring Estates.

H 2

Con-



And

And herein we confider,

1. Their Kinds.

2. Their feveral Parts.

As to the Kinds of Deeds, they are either,

1. Such as have their Efficacy without the Adjunct of some other Ceremony.

2. Such as to their Effects require another Ceremony to be joined with them.

I. As to the former of these, they are of Three Kinds:

> Grants: Releases; Confirmations.

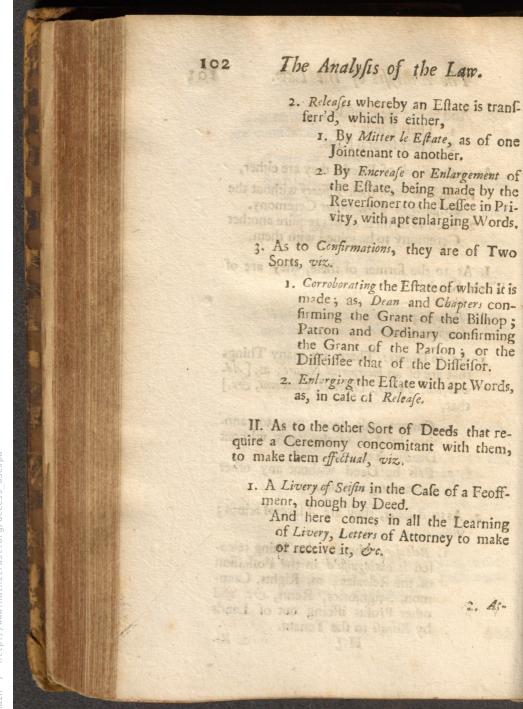
- I. As to Grants: There are many Things that are of an Incorporeal Nature; as, [Advow fons, Tythes, Liberties, Commons, &c.] that,
  - I. Cannot pals from one to another by Act of the Party without Deed. Yet,

2. Pass by Deed without any other Ceremony requifite.

- 2. As to Releases, they are of several Kinds; viz.
  - 1. Releases, whereby the Thing released is extinguish'd in the Possession of the Releasee; as, Rights, Common, Seigniories, Rents, &c. and other Profits issuing out of Lands by Release to the Tenant.

H 2

2. Re-



- 2. Attornment requisite in Cases of Grants, of Reversions, Remainders, Rents, Seigniories.
  - And here of Attornments; how, by whom, and when to be made.

    And the feveral Effects thereof, viz.
  - 1. To create a Privity of Distress or Action, as in the Case of Fines, Quid Juris clamat, Quem Redditum reddit, Per quæ Servitia.

2. To pass the Interest, as in case of Grants, singly by Deed.

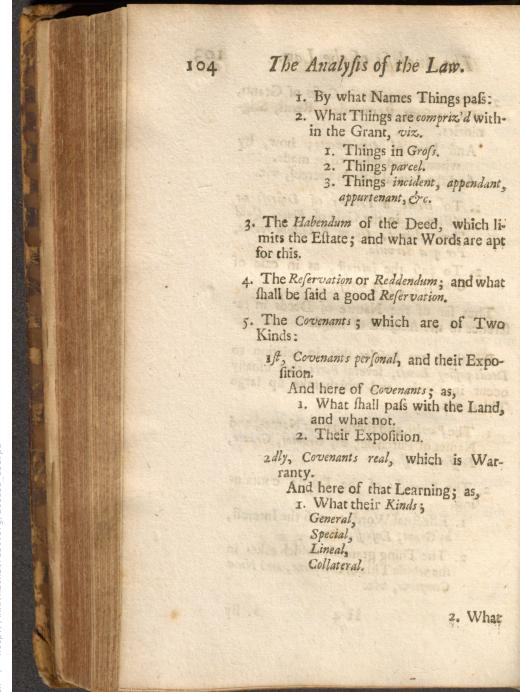
Thus far of the Nature of Deeds in reference to the Acquest of Lands.

But there are besides this, in relation to Deeds passing Lands, several Parts that usually occur in Deeds, and which take up large Titles, viz.

- 1. The Parties, and therein their Names, and Names of Purchase; as, Grantor, Grante, Feoffor, Feoffee.
- 2. The Premisses of the Deed; containing,
  - I. Effectual Words to pass the Interest, as Grant, Enfeoff, &c.
  - 2. The Thing granted, which takes in the whole Title of Comprize, and Nient Comprize, viz.

H 4

I. By



- 2. What their Effects:
  - 1. By Way of Action, Voucher, Warrantia Chartæ.
  - 2. By Way of Bar, or Rebutter
- 6. The Condition or Defeafance.

And here all the Learning of Conditions and Limitations: And incident to this, Learning of Deeds falls in those Two great Titles, viz.

- Deeds are necessary to be pleaded or shewn.
  - 2. Exposition de Faits; which is full of infinite Variety, according to the Texture of Deeds, and their several Clauses.

And this letter Way is either

SECT.

## S E C T. XXXVI.

Of Conveyances by Force of Statutes.

A ND thus far of Conveyances according to the Course of the Common Law, and now I proceed to Conveyances, according unto, or by Force or Power of Acts of Parliament.

Conveyances according to or by Vertue of Acts of Parliament, are of Two Kinds, viz.

- 1. By Way of Bargain and Sale, according to the Stat. 27 H. 8.
- 2. By Way of Use.

And this latter Way is either,

1. With Transmutation of Possession;

By Feoffment or Fine.

2. Without Transmutation of Posses-

By Covenant to stand seized.

And this is a large Field, for all the Learning of Uses come in here; as, Of Considerations sufficient to raise it.

Contingent Uses, &c.

How destroy'd; How revived.

3. By

And here all that voluminous Title of Devises, and the Incidents thereto, may be introduc'd.

#### S E C T. XXXVII.

Concerning Customary Estates.

THUS far of Estates at Common Law; we come now to Customary Estates, viz. Tenant by Virge, or by Copy of Court-Roll.

And because this is a special Kind of Customary Estate, and I shall not have again to do with it, I shall shortly consider these Two Things, viz.

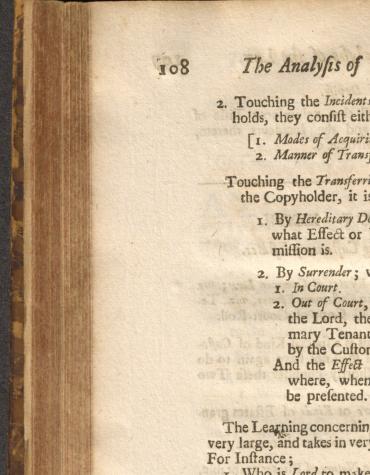
- 1. The Nature or Kinds of Estates gran-
- 2. The Incidents relative thereunto.
  - 1. Touching the Nature of Estates grantable, the Custom directs it.

For by Custom it is grantable,

- I. In Fee Simple.
- 2. In Fee Tail: And here of the Entailing Copyholds, where it may be, and how barred.
  - 3. For Life or Lives.

2. Touch-

BEG W = )



# The Analysis of the Law.

- 2. Touching the Incidents relative to Copyholds, they confift either in,
  - [1. Modes of Acquiring: Or, 2. Manner of Transferring.

Touching the Transferring the Interest of the Copyholder, it is done,

- I. By Hereditary Descent: And here of what Effect or Ule the Heirs Ad-
- 2. By Surrender; which is either,
  - 2. Out of Court, into the Hands of the Lord, the Steward, Customary Tenants when warranted by the Custom.

And the Effect of fuch Surrender; where, when, and how it must

The Learning concerning Copyholds is grown very large, and takes in very many Particulars:

- I. Who is Lord to make a Grant or Admittance: What a Dominus pro Tempore, or a Diffeisor, may do therein.
- 2. Who is a Steward to perform that Office, and his Power therein.
- 3. What shall be said a Copyhold Manor, or a Copybold Court, to enable fuch Grants.

4. What

4. What shall be said a Forfeiture of a Copyhold Estate:

By Wast; By Alienation;

By Refusal to perform Services.

Who shall be bound by such Forfeiture.

Who shall take Advantage of it.

What shall be a Dispensation with it.

Besides which, there are very many more Considerables will fall under the Title of Cassomary Estates, or Copybolds.

SECT.

### SECT. XXXVIII.

Of Translation of Property by Forfeiture.

Now come to those Translations of Estates which happen by Default of the Tenant in Fee-Simple, viz. such as are Forseitures of his Estate.

### And these are of several Kinds:

- 1. Forfeiture by Attainder; either,
  - to the King by the Common Law. (And this lets in all the Learning touching Offices, Petitions, &c.) Or,
  - 2dly, Of Felony; whereby it escheats to the Lord; whereof before, Sect.
- 2. Forfeiture by Purchase in Mortmain without Licence, whereby it goes to the Lord.
- 3. Forfeiture by Cessing from doing his Services per Biennium. (And here comes in the Learning of Cessions.)
- 4. Forfeiture by Alienation, contra Formam Collationis.

SECT.

# SECT. XXXIX.

Of Wrongs or Injuries. And First, Of Wrongs to Persons.

Come now from the Consideration of Rights or Jura, to consider of Wrongs or Injuria; wherein I shall take this Order, viz.

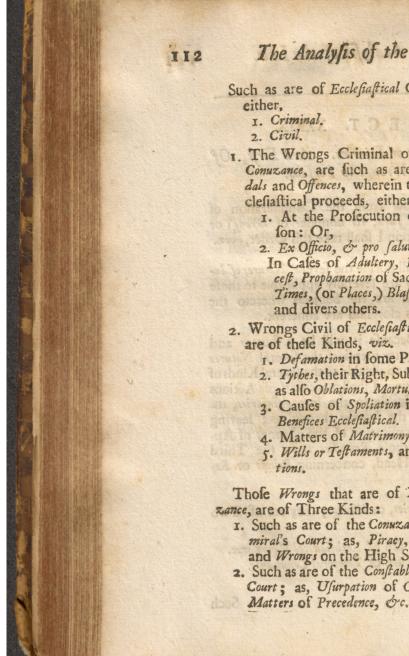
First, I shall pursue the several Natures of Injuries, as they are severally applicable to those Things which are the Subjects whereto the several Rights aforesaid are adherent.

Secondly, Because it will be a shorter and plainer Way to mention the several Natures of the Remedies applicable to the several Kinds of Injuries, or Wrongs, I shall mention those Actions that are applicable to the several Injuries, together with the Injuries themselves; leaving the farther Explication of the Manner of Application of those Remedies unto the Third and Proper Head, concerning Reliefs or Remedies.

As to Injuries, or Wrongs, they are of Two Kinds, viz.

- 1. Such as are of Ecclefiastical Conuzance.
- 2. Such as are of Temporal Conuzance.

Such



# The Analysis of the Law.

Such as are of Ecclesiastical Conuzance, are

I. The Wrongs Criminal of Ecclesiastical Conuzance, are such as are Publick Scandals and Offences, wherein the Judge Ecclesiastical proceeds, either,

r. At the Profecution of some Per-

2. Ex Officio, & pro salute Anima; as, In Cases of Adultery, Fornication, Incest, Prophanation of Sacred Things, or Times, (or Places,) Blasphemy, Heresy, and divers others.

2. Wrongs Civil of Ecclesiastical Conuzance,

1. Defamation in some Particulars.

2. Tythes, their Right, Substraction, &c. as also Oblations, Mortuaries, Pensions.

2. Causes of Spoliation in relation to Benefices Ecclesiastical.

4. Matters of Matrimony and Divorce:

5. Wills or Testaments, and Administra-

Thole Wrongs that are of Temporal Conuzance, are of Three Kinds:

r. Such as are of the Conuzance of the Admiral's Court; as, Piracy, Depredations, and Wrongs on the High Sea.

2. Such as are of the Constable and Marshal's Court; as, Usurpation of Coats of Arms,

3. Such

3. Such as are of the Conuzance of the Common Law Courts.

This later Head is very large and extenfive; but in general, may be divided into Two Kinds:

r. Such as are Criminal or Publick, wherein the Wrong Doer is proceeded against Criminally. And these are to be distributed under the Titles of Pleas of the Grown.

2. Such as are Civil or Private; wherein at the Suit or Profecution of the Party injur'd, he has Reparation or Right done.

Touching Injuries to Civil Rights or Interests, they must be distributed according to the several Natures and Kinds of those Rights which by those Wrongs are injur'd: And since we have already before consider'd of Two Sorts of Rights, viz. Rights of Persons, and Rights of Things, I shall begin with those Wrongs that relate to the Rights of Persons.

And fince in the Distribution we have made of the Rights of Persons, we have observed, That the Rights of Persons have a double Consideration, viz.

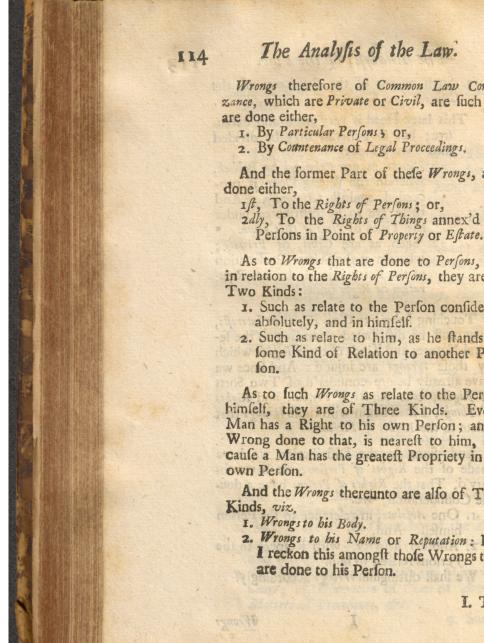
1. One Absolute, in reference to the Person himself. And,

2. Another Relative, with Respect to the Persons related to him.

We shall distinguish Wrongs accordingly.

I

Wrongs



# The Analysis of the Law.

Wrongs therefore of Common Law Conuzance, which are Private or Civil, are such as

I. By Particular Persons; or,

2. By Countenance of Legal Proceedings.

And the former Part of these Wrongs, are

Ist, To the Rights of Persons; or, 2dly, To the Rights of Things annex'd to

As to Wrongs that are done to Persons, or in relation to the Rights of Persons, they are of

1. Such as relate to the Person consider'd

absolutely, and in himself.

2. Such as relate to him, as he stands in fome Kind of Relation to another Per-

As to luch Wrongs as relate to the Person himself, they are of Three Kinds. Every Man has a Right to his own Person; and a Wrong done to that, is nearest to him, becaule a Man has the greatest Propriety in his

And the Wrongs thereunto are also of Two

I. Wrongs to bis Body.

2. Wrongs to his Name or Reputation: For I reckon this amongst those Wrongs that are done to his Person.

I. The

1. Assaults; as, Beating, Maining, Wounding of a Man:

Wherein the Law gives a double Remedy, viz.

I. Preventional; by Security of the Peace.

2. Remedial, by Action, either of Trespass,
Assault,
Battery,
Wounding,
Appeal of Mayhem.

2. Imprisonment, without lawful or just

Wherein the Law also gives him a double Remedy, viz.

as by Habeas Corpus into the King's-Bench or Common Pleas, Writs of Mainprise, De Odio & Atio, De Homine Replegiando, &c.

2. To recover Damages by Way of Compensation for it, by Action of False Imprisonment; or if the Imprisonment be lawful, but the Party baillable, and his Bail refused, in some Cases a special Action of the Case upon the Stat. 23 H. 6.

I 2 II. As

#### The Analysis of the Law. 116

II. As to Wrongs done to his Name, they are of Two Kinds, viz.

1. Scandal by Words spoken, Libels, Pi-Etures, &c. wherein the Remedy is to have Compensation in Damages by Action of the Cale.

And here comes in all that large Title of Actions of Slander, and what Words are scandalous.

2. Under Pretence of a Legal Prosecution, but false and malicious; as, for a false and malicious imposing some great Crime by Complaint to a Justice of Peace, or by preferring a Bill of Indictment fallly and maliciously.

The Remedy the Law gives, is, 1. Sometimes by an Action of Conspiracy.

Stene of Common Plants Wills of

Monde of De Odio & Alex De Ho-

2. Sometimes, and more ordinarily, by ¿cion upon the Cafe. as by that as Corpe on a the Ring's

ohe Set To mail A laborate of som SECT.

### SECT. XL.

Of Wrongs to Persons under Relation.

THE Wrongs that are done to a Person under some Kind of Relation, principally take in the Three Occonomical Relations before mentioned; as,

I. Husband and Wife.

2. Parent and Child.

3. Master and Servant.

And fome of the Civil; as,

I. Guardian and Pupil.

2. Lord and Tenant, Oc.

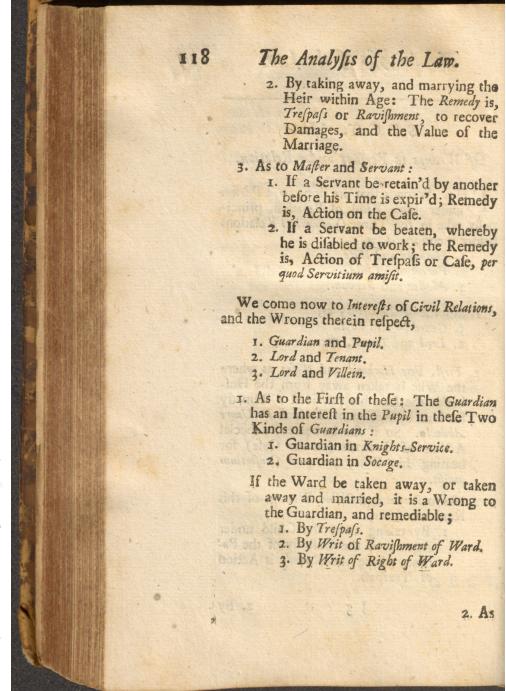
1. First, For Husband and Wife; as where the Wise is taken away from the Husband, the Law has provided a Remedy for him by Action of Trespass De Uxore Abducta. So if she be beaten, a special Action of Trespass (on the Case) for beating his Wife, per quod Consortium amist.

2. As to Parent and Child: Wrongs of this Kind are either,

I. By taking away the Child under Age out of the Custody of the Parent, where the Remedy is Action of Trespass.

1 ;

2. By



- 2. As to that of Lord and Tenant: If there be Tenants at Will, and either by Menaces, or by unlawful Distresses, they are driven away from their Tenancies, it is a Wrong which the Lord may repair himself in by special Action of the Case.
- 3. So if a Villein be forced from his Service, or beaten or maimed so that he is disabled to perform such Service, an Action of Trespass lies, per quod Servitum amist.

I4 SECT.

#### SECT. XLI.

Of Wrongs in relation to Rights of Things.

And First, of Things Personal.

In Itherto of Wrongs as they relate to Perfons, either absolutely, or under Relations Oeconomical or Civil; I come now to fuch Wrongs as relate to Things, and those are either,

I. To Things Personal.

2. To Things Real.

Wrongs relating to Things Personal are of these Kinds, viz. According to the Nature of the Things:

1. Personal Things in Possession.

2. Personal Things in Action.

I. As to Personal Things in Possession, viz. Goods, Cattle, Money, &c. the Wrongs thereto are of Two Kinds:

Detaining of them, which is an Injury, and for which the Party grieved has his Remedy, viz. either,

1. To have the Things themselves, if

detained by Replevin.

2. To have Reparation in Point of Damages by Action, either of Tref-pass Vi & Armis, or of Trover & Conversion.

2. An unjust Detaining, without an unjust Taking.

The Remedy:

- 1. The Things in Specie, by Replevin, if taken for Damages only; or,
- 2. Trover and Conversion for the Thing, or if it can't be had, for Damages by Detinue.

And although Charters concerning Land be in the Realty in respect of their Relation to the Land, yet they are not in themselves any more than Paper, or Parchment, and Wax; and therefore are within the aforesaid Rules, in respect of taking or detaining them.

- II. Personal Things in Action are likewise of Two Kinds:
  - 1. Such Things in Action as arise by express Contract or Agreement.
  - 2. Such Things in Action as arise by implied Contract, or Quafi ex Con. tractu.
  - 1. The former Kind are of Two Sorts:
    - I. By Deed or Specialty.
    - 2. Without Deed or Specialty.
    - 1. Those that are with or by Specialty are also of Two Kinds, viz.

I. Debts:

## The Analysis of the Law.

And the Wrong that relates to them is Non-payment according to the Deed. The Remedy is Action of Debt, to recover the Debt it felf, and Damages for Non-payment.

2. Covenants:

The Wrong herein is Breach of Cove-

The Remedy, Action of Covenant: And here comes in the Learning of Covenants.

What Words make a Covenant. What Covenants pass to the Alfignees, &c.

2. Those that are without Specialty.

The Wrong and Remedy the same as before, in Cases of Debts by Spe-

And hither also may be referr'd those Things, which though they favour of the Realty, are yet recoverable by Action of Debt; as Rents referved on Leafes for Years, Relief, &c.

2. Promises; for a good Consideration, whether they be Promises that arise by Law, or fuch as are collateral.

Remedy in all fuch Cales, is to recover Damages by Action on the Cafe.

And here comes in, Warranty of Chattels upon Sale. 2. Such

- 2. Such Things in Action as arise by an implied Contract are many: For Instance;
  - I. In Contracts for Things, it is generally intended, That none fell any Thing that he knows not to be his own; if he does, an Action on the Case lies in Nature of Disceit.
  - 2. In Contracts for Victuals, is implied, That they are not unsubolesome; if they be, an Action of the Case lies.
  - 3. In Persons that undertake a Common Trust, it is imply'd, That they perform it; otherwise an Action on the Case lies. As for Instance:

In the Case of,

- I. A Common Hoft, is to secure Goods in his Inn.
- 2. A Common Carrier, or Bargeman, to secure the Goods he carries.
- 3. A Common Farrier, that he perform his Work well, without hurting the Horse.
- 4. A Common Tailor, that he does his Work well; and so of other Tradesmen, &c.

SECT.

T Come now to those Wrongs or Injuries which are done to Things Real, and the Rights of them.

And these may be divided in these Two Kinds, viz.

I. Such as are without a Removing the Owner or Proprietor out of Possession.

2. Such as are with a Remover of him out of his Possession.

Those which are without a Remover out of Possession, are of several Kinds: I shall reduce 'em to these following, viz.

Hedges, &c. by the Party (Trespassor) himself, or by his Command, or by his Cattle, &c.

Remedy, to repair the Party in Damages, by Action of Trespass, Quare Clausum

fregit.

2. Nusances,

Total Marie Marie

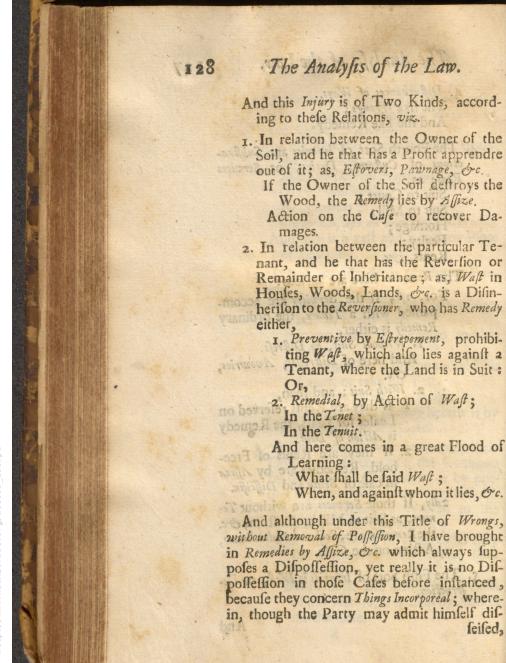
Generated on 2023-03-20 16:46 GMT / https://hdl.handle. Public Domain / http://www.hathitrust.org/access use#pc

- 2. Nusances, or Annoyances, either,
  - I. To Interests in Things Corporeal, as Houses, &c. by stopping Lights, erecting Lime Kilns, or Things annoying another's Dwelling, or withdrawing Water from a Mill, &c.
  - 2. Or, To Things Incorporeal; as,
- To Chemins or Ways, by obstru-
  - 2. To Markets, by creeting another Market too near them.
  - 3. So of Ferries, by erecting another too near.
- And infinite more Instances may be given, the Title of Nusances being very large.
- The Remedies in all these Cases are either,
- move them, if done to Inheritances Corporeal or Chemins.
- 2. By Suit; as,
- 1. Quod permittat, Assize of Nu.

  Sance, to remove the Thing, and
  recover Damages.
- 2. Action on the Case to recover Damages. Vide Sect. 46, 6 47.
- 3. Disturbances: And this principally concerns such Real Things as are Incorporeal: For Instance;

3

also oth go I. Distur-



feised,

seised, it is but a Disseisin at Election, and rather made a Disseisin by his bringing an Assize, which the Wrong-Doer shall not dispute than truly so. And now:

#### SECT. XLIII.

Concerning Wrongs which carry with them an Amotion of Possession.

HE Wrongs which carry with them an Amotion of Possession are of Two Kinds, and concern,

I. The Rights of Chattels.

2. The Rights of Freeholds.

I. As to the Rights of Chattels, whereof the Party is disposses'd by a Wrong-Doer, they are these, viz.

I. Leases for Years.

The Remedy is by Ejectione firmæ; or if by the Reversioner, Quare ejecit infra Terminum.

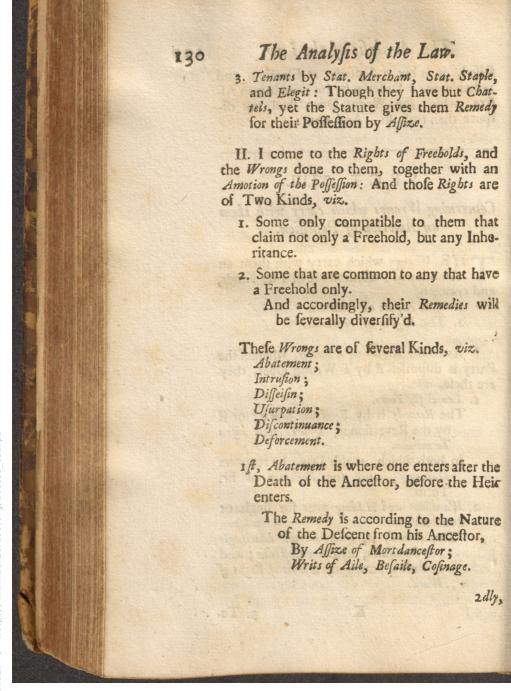
In both which, at this Day, he recovers Damages, and the Poffession of his Term.

2. Wardships and Holding over for single or double Value.

The Remedy is, Quare intrusti Maritagio non Satisfacto, Ejectione Custodiæ; and against a Stranger, a Writ of Right of Ward.

K

3. Te-



2dly, Intrusion is an Entring or Continuing in Possession after an Estate for Life determined.

The Remedy: He in the Reversion or Remainder may enter; or if his Entry be taken away, has his Writ of Intrusion.

adly, Disseism is a large Title, and is an unlawful Entry and Ouster of him that has an actual Seisin and Freehold.

And it is either,

0 510 1938

I. With Force: In which Case the Party disselsed has his Remedy, either,

1. By Writ of Forcible Entry upon the Stat. 8 H. 6. to recover the Possession, and Damages.

2. By Affize of Novel Diffeisin to recover his Possession, and Damages, and the Party to be fined and imprison'd for his Force.

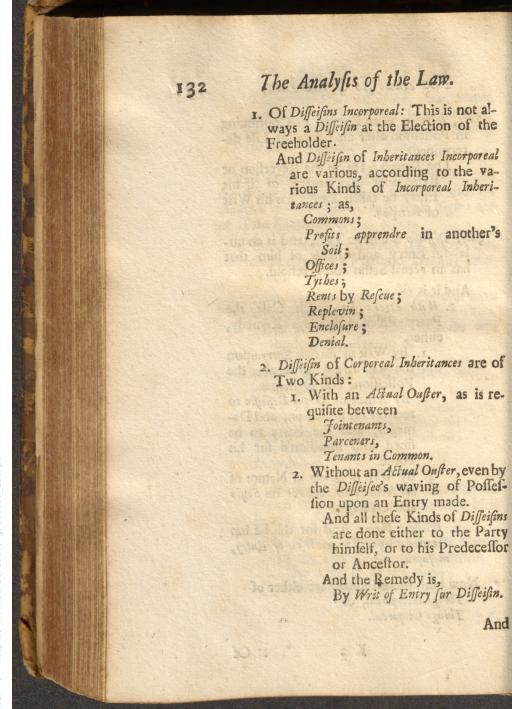
 By Writ of Entry in Nature of an Affize, to recover his Seifin and Damages.

2. Without Force: And for this he has Remedy by Assize, or Writ of Entry, ut supra.

Now both these Disseisins are either of Things Incorporeal, or Things Corporeal.

K 2

I. Of



And these Writs of Entry sur Disseisin are either,

the first Disselfor; or in the Degrees, as in the Per, or Per & Cui, against the Feoffee of the Disselfor or his Feoffee: Or,

2. They are in the Post when the Degrees are spent, or when the Tenant comes in under the Diffeisor in the Post;

As the Lord by Escheat, &c.
And this Learning of Disseiss, of
Assizes, and of Entry sur Disseisin, are large and comprehensive Titles, and of great
Variety and Extent.

Athly, Usurpation: This Title refers only to Advowsons; where one that has no Right to present, presents to a Church, and his Clerk is admitted and instituted, and continues in by Six Months.

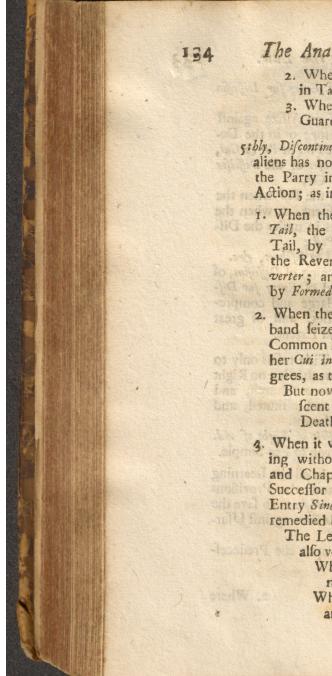
The Remedy is by Writ of Right of Ad-

And this also takes in all the Learning of Advowsons, and the Provisions made by the Stat. West. 2. to save the Right of Possessory Actions against Usurpation:

1. Where it is upon the Predecef-

K 3

2. Where



## The Analysis of the Law.

- 2. Where it is upon the Ancestor in Tail.
- 3. Where upon Tenant for Life, Guardian in Chivalry, &c.

stbly, Discontinuance: This is where he that aliens has not the full Right, yet it puts the Party injur'd thereby to his real Action; as in these Instances, viz.

- Tail, the Remedy is, for the Heir in Tail, by Formedon in Descender; for the Reversioner, by Formedon in Reverter; and for the Remainder-Man, by Formedon in Remainder.
  - 2. When the Alienation was by the Hufband seized in Right of the Wise; at Common Law the Wise was driven to her Cui in Vita, in or out of the Degrees, as the Case sell out.

But now the may enter (unless a Defect be cast) after her Huband's Death, by the Stat. 11 H. 7.

3. When it was by a Bishop, &c. aliening without the Assent of the Dean and Chapter at Common Law, his Successfor was driven to his Writ of Entry Sine assense Capituli. But this is remedied by Stat. 1 & 13 Eliz.

The Learning of Discontinuances is also very curious; as,

Who may discontinue; who not.

What shall be a Discontinuance; and what not. And

And as the Learning thereof is ample, so is that of the Remedies thereof, by Formedon,

and a more comprehensive Expression than any of the former; for a Disseisor, Abator, Intruder, Discontinuer, Usurper, and those that claim under them by Feoffment or Alienation, are all Deforceors.

But the proper Application of the Word is to fuch a Person, who, though he has not a just Right, has yet recover'd against, or barred him that has the true Right, either,

n. By Default. And then the Remedy for the Party so desorced is,

If he had only a particular Interest, by Per quod ei Deforceat.

If he were Issue in Tail of him that so lost, by Formedon.

If Tenant in Fee-Fimple, or his Heir, by Writ of Right.

2. Or in a Real Action of an Inferior Nature; as Writ of Entry, &c. And then,

1. Of the Issue in Tail of him that so lost, or is barred. The Remedy is, by Formedon in Defeender.

2. Of the Tenant in Fee-Simple that so lost, or is barred. The Remedy is, by Writ of Right.

K4 SECT.

too out guidance out is but.

## SECT. XLIV.

Of Wrongs that have the Countenance of Legal Proceedings of Courts.

HItherto I have proceeded in examining Wrongs done by Parties themselves; I now come to consider of Wrongs done by Courts, or their Officers, in relation to Legal Proceedings.

And they are of Two Kinds, viz.

1. When the Court proceeds in a Cause whereof they have no Jurisdiction.

2. When they proceed in Causes whereof they have Jurisdiction, but proceed erroneously.

r. The former of these is a Wrong, and the Party has his Remedy or Relief therein.

1. By not submitting to the Sentence or Judgment, and bringing his Action

against them that execute it.

2 By Prohibition from a superior Court; as when an Ecclesiastical Court proceeds in a Cause of Temporal Conuzance, or an inferior Court, that has a limitted Jurisdiction, holds Plea of a Thing done out of its Jurisdiction.

2. The

2. The latter is when they proceed erroneoully, or by committing some Mistake in a Matter within their Jurisdiction.

This I call a Wrong: Not that the Party that supposes himself injur'd has any Remedy against the Court, or the Judge that thus proceeds; for if Men should suffer barely for Error in Judgment, when there is no Corruption, no Perfon would be Judge in any Case. But I call it a Wrong, because, in Truth, the Party has a Right to be relieved against such Judgment: And,

1. In Causes Ecclesiastical or Maritime, the Law has provided a Relief against an erroneous Judgment, By Appeal to other Judges.

2. In Caufes of Common Law Conuzance, Errors or Mistakes in Judgment are

revers'd.

County Courts, and Courts
Baron,

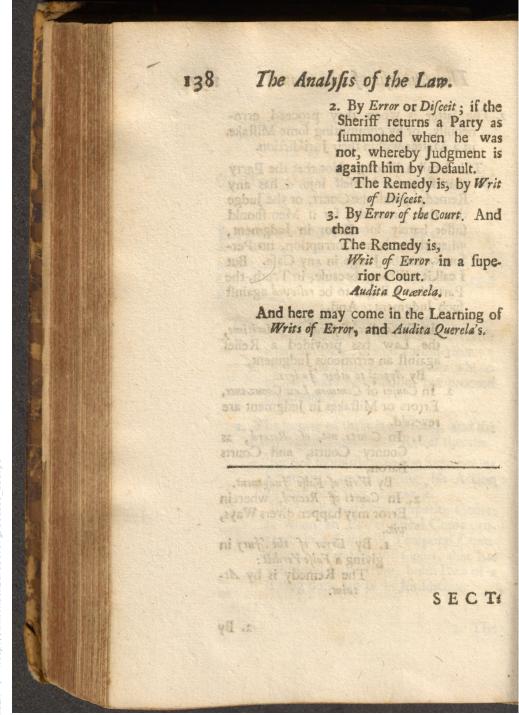
By Writ of False Judgment.
2. In Courts of Record, wherein Error may happen divers Ways,

viz.

1. By Error of the Jury in giving a False Verdia:

The Remedy is by Attaint.

2. By



### SECT. XLV.

Concerning Remedies, and the Method of obtaining them.

In the former Sections I have consider'd of the various Kinds of Wrongs or Injuries, and under those Distributions have mentioned their ordinary Remedies, and thereby have much contracted this Title; wherein I shall only give some general Rules relating to the Manner of the Application of those Remedies, leaving every particular Remedial Writ, together with the Process belonging to it, to be consider'd and digested under their several Titles in the former Sections.

Remedies for Wrongs are according to the Nature of those Wrongs, viz.

I. Ecclesiastical.

2. Civil.

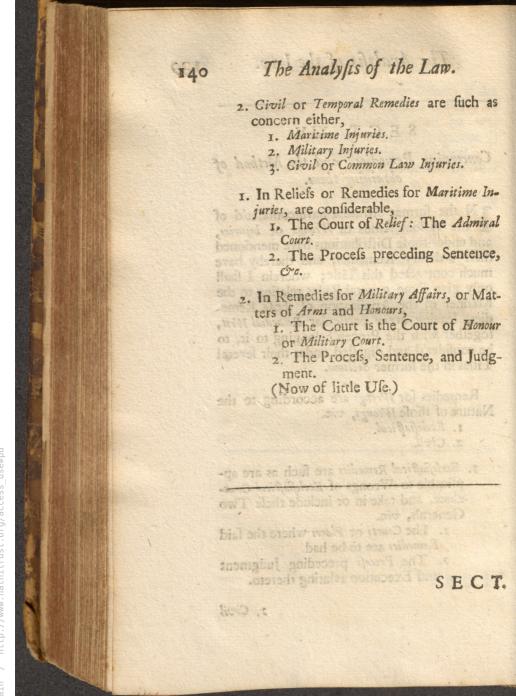
1. Ecclesiastical Remedies are such as are applicable to Wrongs of Ecclesiastical Conuzance, and take in or include these Two Generals, viz.

I. The Courts or Places where the faid

Remedies are to be had.

2. The Process preceding Judgment and Execution relating thereto.

2. Civil



## SECT. XLVI.

Remedies at Common Law: And First, Of those without Suit.

THE Law in many Cases provides a Remedy without Suit, which in general is either,

1. By Act of the Party.

2. By Act in Law.

Remedies allowed by the Parties own Act, are in reference,

1. To Things Personal.

2. To Things Real.

I. In reference to Things Personal:

1. If another does wrongfully take or detain my Goods, my Wife, my Child, or my Servant, I may lawfully retake them again, if I can, fo I do it not riotoully.

2. So I may defend my felf (or them) by

Force, if assaulted.

2. In reference to Things Real.

In these and some other Cases, the Law allows a Man a Remedy without being driven to it, viz.

Law amore due to the blace that I have

. ioffson't will be my Ameettor. In



## The Analysis of the Law.

r: In Cases of Nusance done to my Freehold, I may remove them, if I can, without Riot; as,

1. To remove an Obstruction out

of my Way.

142

2. Or the Over-hanging of another Man's House over mine.

3. Or the Obstruction of Water

running to my Mill.

- 2. In Cases of Rents, I may distrain the Goods or Cattle that are Levant and Couchant upon the Tenement charged therewith.
- 3. And so in Cases of Cattle doing Damage upon my Ground, I may distrain upon my Ground Damage Feasant. And so I may distrain Cattle that are sold for my Toll.

#### 3. In Reference to Lands.

r. I may distrain, and maintain my own Possession against any Person that would eie& or dissels me.

2. Where I have a Right or Title unto Lands, and my Entry not taken away. I may gain the Possession by my Entry.

And this necessarily draws into Examination these Two Things, viz.

Breach of a Condition in Fact, or in Law annex'd to an Estate that I have parted with, or my Ancestor.

.

And

- And here comes in, Of Conditions; what are good, and what not; when and to whom it gives an Entry; and how destroy'd or suspended.
- 2 Rights of Entry: And this lets in all those Considerations that concern the Titles of Entry Congeable, of Descents that Toll Entry, or Continual Claim, of Avoiding Descents by Infancy, by Stat. 34 H. 8.

But regularly;

- 1. In Personal Things in Action, as for Debts, or Covenants, or Promises: Or,
- 2. As to Rights of Real Things, where the Entry is by Law taken away, the Party cannot be his own Judge, but must have Recourse to the Courts of Common Justice, except in the Cases following, viz.

By Act in Law, in some Cases without Suit, the Party shall have Remedy, where by his own Act he cannot; as,

1. In Things Personal; as if the Debtor makes the Debtee Executor, he may pay himself.

2. In Things Real; as where a Man's Entry is taken away; as by Defcent, or by Discontinuance; yet if he come to the Possession without Folly or Covin, he shall be remitted.

And here all the curious Learning of Remitters comes in.

SECT.

and bere comes in. OF Continue: what

Concerning Remedies at Common Law by Suit.

I therto concerning Wrongs and Injuries in relation to Things both Real and Perfonal, and Remedies for the same without Suit; I now come to consider of Remedies by Suit, and the Means or Method of their Application.

Remedies by Suit seem to be of Two Kinds:

- 1. Such as the Parties provide for themfelves by mutual Confent.
- 2. Such Remedies as the Law provides for them.
- I. Remedies that Parties provide for themfelves are of Two Kinds:
  - 1. By their own immediate Accord.
  - 2. By transferring the Decision of it to others.
- 1. The former of these, viz. The immediate Consent of the Parties, is that which in Law is called an Accord, which, with Satisfaction accordingly made, is in some Cases of Personal Injuries a Bar to any other Remedy.

of Remitters comes in.

And

3

http://www.hathitrust.org/access

Generated on 2023-03-20 16:46 GMT Public Domain / http://www.hathi

- And this lets in the Learning of Accords and Concords; what are good, and what not; where they are a Bar, and where not.
- 2. The latter of those, viz. The transfer-
- and it is If to Two, or more, is called an
- 2. If to one, an Umpirage.

And here the large Learning of Arbitraments and Awards; what a good Submission; what a good Award, or not; what Remedy upon it; when and where it is a Bar in Personal Actions, Sc.

II. Secondly, Such Remedies as the Law provides, are also of Two Kinds, viz.

- I. Such Remedies as the Law provides without Suit; whereof before.
- 2. Such Remedies as the Law provides in the Courts of Justice, settled by Law, and according to those Constitutions touching Actions and Suits, that the Law has provided and instituted.

And this takes in these Considerations, viz.

- by Law, for recovering of Rights, and redreffing of Wrongs.
- 2. The Remedies themselves by certain Writs instituted by Law, and applicable to those several Wrongs.

3: 1

(B)



# The Analysis of the Law.

- 3. The Prosecution or Pursuit of those Remedies in the said Courts.
- I. The First of these concerns the large Learning of the Jurisdiction of Courts: And forasmuch as there are several entire Tracts written thereon, and I have before touched upon them, I shall here forbear to say any Thing further herein; only that that Learning may with Reason enough be transferr'd hither, at least some Particulars thereos.
- 2. The Second, touching the Natures and Applications of those Remedies, I have in the former Sections, under every several Kind of Wrong or Injury, mentioned the respective Remedy, and therefore shall not again repeat it here.
- 3. The Third, which is the Profecution, or Pursuit, of those Remedies, is the Business of this Division.

But before I enter upon that Matter, I shall premise these Two Things, viz.

First, That the best Way to meet with all the Titles of the Law in this Business, will be to pursue the same in the Order and Method of the Proceedings themselves, without any other Distribution.

Secondly, That there are fome Things wherein the Pursuit of a Real Suit and Personal do differ; as in the Process, the Judgment, and the Execution: But in most other Things they

do agree, or, at least, the Pursuit of a Real Action contains all the general Learning of a Personal Action, and much more.

Where therefore there is a fignal Difference, I shall observe it by the Way, without running through the whole Proceedure of a Real and Personal Action distinctly; and shall only here observe, that the general Parts of a Suit are these:

- 1. The Process.
- 2. The Pleading.
  - 3. The Iffne.
  - 4. The Trial.
  - 5. The Judgment:
  - 6. The Execution.
- 7. The Appeal.

L2 SECT

Of Process and Appearing.

I. Pirst, Where a Wrong is done, or a Right detain'd, the Party injur'd is to make his Application or Suit for that Remedy which the Law ordains; and in order thereto, to take out such (Writ or) Process as the Law (on the Circumstance of his Case) requires.

The (Common, Usual,) Ordinary Process are are as follow:

I. In Personal Actions,

Summons, Attachment, Distress, Capias, Alias, Pluries & Exigent, and in some it begins with Attachment.

2. In Real Actions,

'Tis Summons, Grand Cape, and Judgment, or after Appearance, Petit Cape, and Judgment.

3. In Mix'd Actions,

In Assizes, Attachment, and upon Default, the Inquest taken by Default. In Wast, Attachment and Grand Distress,

and an Inquiry of the Wast, Oc.

Every

Generated on 2023-03-20 16:46 GMT / https://hdl.handle.net/2027/uiuc Public Domain / http://www.hathitrust.org/access use#pd

Every Process gives the Defendant a Day in Court; and this lets in these several Things, V12.

Four in Court, and the Variety of it.

And incident to this, is, Adjournment; and, Discontinuance.

And at that Day or Jour in Court, the Defendant or Tenant either appears, or not appears.

Nowigers &

Here of Appearance, and its Diversity: 1. By Guardian, (or Prochien Amy.)

2. By Attorney.

3. In Person. ot amos I girmasa Ce 11

If there be not an Appearance,

1. Either a Default is made:

And here of the Process upon Default,

I. In Personal Actions.

2. In Real Actions,

2. Or there is an Excuse of Appearance,

And therein faver Default; John Son A Impariance to plead.

I. By Protection.

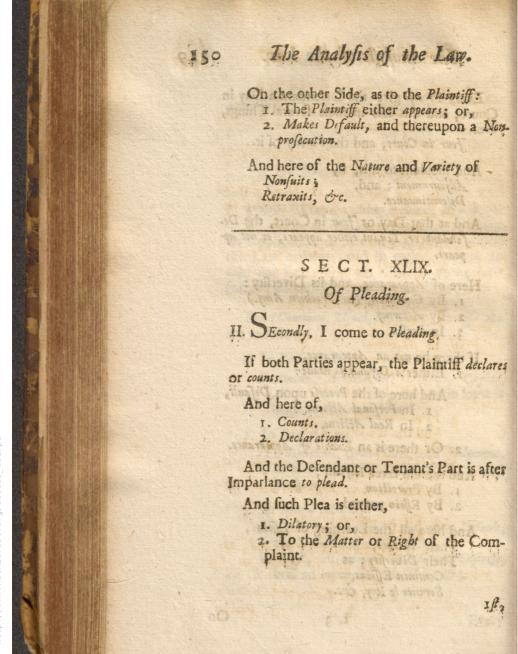
2. By Effoin prayed. As I don't but A

And here all the Learning of Essins; Their Nature, plaint Their Diversity; as

Common Esfoins, Service le Roy, Oc.

L 3

On



- Ift, Dilatory Pleas are of Several Sorts:
  - 1. To to the Jurisdiction of the Court:
    - I. From the Place where the Suit
    - 2. From the Thing in Controversy, as, Ancient Demesia
  - 2. To the Impotency, or Non-ability of the Plaintiff, which is very various; as,
  - I. Alien Enemy.
    - 2. Outlawry [In Personal Actions.
    - 3. Excommengement.
    - 4. And formerly Villenage. And,
    - 5. Profes'd.
- 3. In Abatement,
  And this either,
  - I. Of the Count.
  - 2. Of the Writ.
  - 4. View demanded.

    And this is a large Title.
  - 5. Aid prayed;
    - I. Of the King.

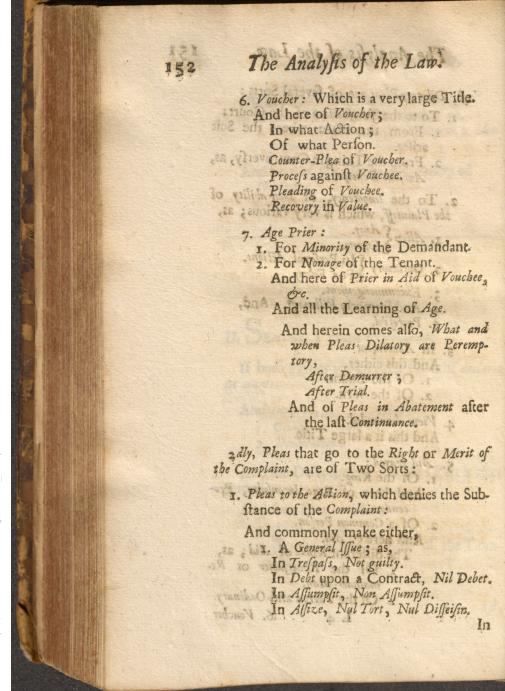
And here of Rege Inconsulte, Pro-

- 2. Of a Common Person.
  - And here of Aid.

The different Kinds of Aid; as,

- I. Of the Reversioner or Remainder-Man.
- 2. Of the Patron and Ordinary.

L 4 6. Voucher :



In Dower, Nunque de seize de Dower. In a Writ of Right, That the Tenant has more Right to hold, than the Demandant has to demand.

2. Or a Common Issue; as,
In Debt on Bond, or Action of Covenant, Non est Factum.
In an Assize of Mortdancestor,
Aile, Besaile, &c. That the Ancestor was never seized.

2. Pleas in Bar: These are very various and different, according to the several Kinds of the Tenants or Defendants Case.

And lets in all the Learning of Bars, &c. as,

Bars are either such as are,

I. Proper.

2. Common. by and smarr

Pleas in Bar therefore considerable,

I. In their (Nature or) Matter.

2. In their Qualities or Manner of Pleading.

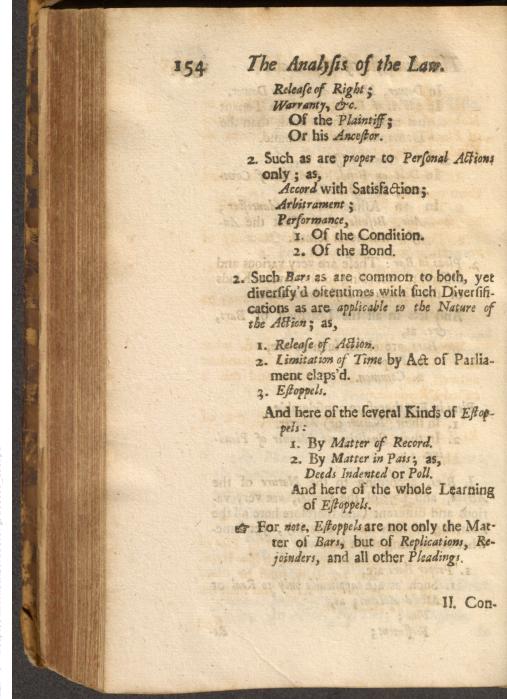
I. Bars, according to the Nature of the Action, and Case of the Parties, are very various and different (and therefore here all the Learning of such Bars comes in), yet somewhat concerning them follows:

I. Proper Bars are,

I. Such as are applicable only to Real or Mix'd Actions; as,

Fine; Feoffment;

Re-



II. Concerning Bars as to their Qualities or Manner of Pleading, the same common Rules of Pleading for the most Part concerns all Kinds of Pleading.

And therefore I shall here shortly insert them once for all, viz.

1. That the Plea be fingle, and not double.

And here of Double Pleas.

2. That it have convenient Certainty of Time, Place, and Persons.

3. That it answer the Demandam's or Plain-

tiff's Count or Plaint.

4. That it be so pleaded, that it may be try'd.

When the Defendant has pleaded, what next follows is, The Plaintiff or Demandant answers the Defendant's Plea; and this is called a Replication.

(And here of the general Rules, &c. of Replications,) viz.

That it be,

1. Certain.

2. Single.

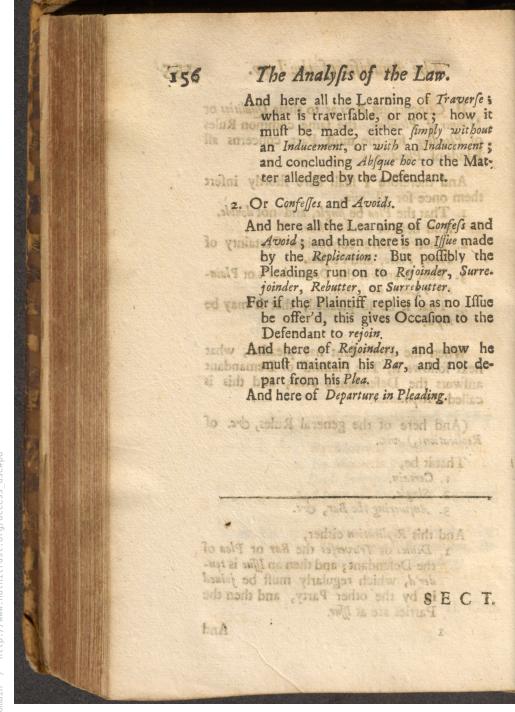
3. Answering the Bar, &c.

And this Replication either,

x. Denies or Traverses the Bar or Plea of the Desendant; and then an Issue is tender'd, which regularly must be joined in by the other Party, and then the Parties are at Issue.

And

I



#### to such a g S E C T. L.

of Island of Island

rapleaded, or.

III. THUS far of Pleading: Now by this Time, either by the Plea, Replication, Rejoinder, &c. the Parties are discended to an Issue, viz. To something affirm'd by the one Party, and denied by the other, which Affirmation and Denial is called an Issue; for now the Parties have no more to do, unless a Matter happen to emerge after Issues join'd, and the last Continuance.

This, if it be pleaded, is called a Plea puis le Darrein Continuance.

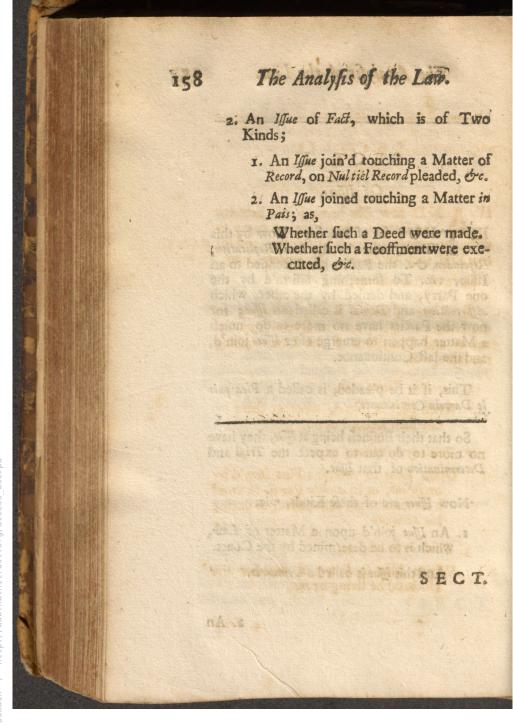
So that their Business being at Issue, they have no more to do but to expect the Trial and Determination of that Issue.

Now Mues are of these Kinds, viz.

a. An Issue join'd upon a Matter of Law, which is to be determined by the Court.

And this Issue is called a Demurrer.

a. An



### naivi son came S E C T. d LL mos

Of Trials.

AND now Issue being join'd between the Parties, they have no more to do but to expect the Trial of that Issue; and for vide Co. 9; that End, they have Days of Continuance given. fol. 30.

Here of Continuances, &c.

Trials are of several Kinds, according to the Nature of Issues, and the several Appointments and Directions of the Law touching the same, viz.

I. Trials by Record; as,

When Issue is join'd, whether there be any such Record or no.

2. Trials by Inspection; as,

Upon Error to reverse a Fine levy'd by an Infant, or in Audita Querela to avoid a Recognizance acknowledged during his Minority.

3. Trials by Proofs; as,

Where Issue in Dower is, whether the Husband be living or not.

4. Trials



# The Analysis of the Law.

4. Trials by Examination; as,

Where an Action of Debt upon Account is brought for Things not lying in Account.

5. Trials by Certificate :

1. Of the Constable and Marsbal, wheon smoother the Party be in Service.

2. Of the Bishop, by Mandate from the Secular Court, as in case of General Bastardy.

So of Issues upon the Right of Marriage between the Parties to the the Nature of Mine, and the sing al Appoint-

So of Plenarty by Institution into Churches. elic lame, with.

6. Trials by Battel:

ed ater. In Appeals, nioi ai sold non W

2, In a Writ of Right.

7. Trials by Jury.

(And this takes in a large Field of Lear: en latest, or in Audita (.gnin to a rough a Recognizance schoom

Trials by fury are,

I. Extraordinary. a. Trick by Erwist as,

2. Ordinary.

1. Extraordinary: In Writ of Right; In Attaint. Quare Appeals.

2. Ordinary: By Twelve Men. de Trivia

Whafez

### Wherein Consider;

- 1. The Process to bring in the Jury, In C. B. by Venire Facias & Habeas Corpus. In B. R. by Venire Fac & Distringus Ju-
- 2. The Tales for want of a full Jury appearing. (And here the whole
  - 3. Challenges of all Sorts: 1. To the Array.
  - 721 To the Polls, on deal wow I
  - 4. The Oath of the Jury.
  - 7. The Evidence to be given to the Jury : What allowable to be given; And when.
- 56. Verdict of the Jurors: 10) to II. General Verdict. 1 119 floor
  - 2. Special Verdict. (2010-050919)
- 7. What Defaults or Miscarriages impeach the Verdict.
  - 8. The Postea, or Return of the Verdict by the Judges of Nisi prius.

M SECT.

# SECT. LII.

Of Judgment.

V. THE Fifth Act in this Business of Prosecution or Suit, is Judgment.

(And here the whole Learning of Judgments, comes in) viz.

I. What shall be sufficient to stay Judgment.

And herein,

er Al ordine

1. Of arresting Judgments,

2. Of reverling Judgments.

II. Upon what it is given; which for the most Part is upon these Premisses (or Precedents.)

I: Upon Default after Default; as in Real Actions after the grand Distress in

Wast; Quare Impedit.

- 2. Upon Confession, Nihil Dicit; Non sum Informatus.
- 3. Upon Demurrer.

4. Upon

4. Upon Tryal of the Issue, according to the various Methods of Trial above mentioned.

### III. The feveral Kinds of Judgments.

- I. In Suits Real.
- 2. In Suit Personal.
- 1. Interlocutory, and not final; as,
  Awards upon the Writ affirm'd, or
  other dilatory Pleas, where the Judgment in many Cases only is,
  Respondent ouster.
- 2. Final, but not compleat:

### And that either,

- 1. Incompleat in Part, but compleat in the Residue; as,
  - Where the Judgment is given for the Thing demanded, but the Damages not yet inquired of.
- z. Incompleat in the Whole; as,

Where a Judgment is given for the Party to recover his Damages, where the Damages are the Principal, wherein,

The Compleat Judgment is not given till the Writ of Inquiry return'd.

M 2

3. Final

# The Analysis of the Law. 164 3. Final and Compleat, with respect to the Action upon which it is given. 4. Final, not only as to the Action upon which it is given, but to all other Actions (touching that Thing); as, Judgment final, in a Writ of Right after the Issue joined, Oc. IV. The Forms of Entry of Judgments. other sistery Hear, where the fa ment so many Cales only is a Respondent author 2. Final, but not contributed And that cither, the t. Incompleat in Part, that compleas The Company Parlyment is not SECT.

b'yranaza (:

i do not here medelle with the averaging

### SE'CT. LIII.

Of Execution.

VI. THE Sixth Act in this Business of Suit, is Execution.

This is a great Field of Learning.

Executions feem to be of Two Kinds:

- I. Within the Year.
  - 2. After the Year.

I. The former of these is also of Two Kinds:

- 1. In reference to Lands recover'd.
- 2. In reference to Debts or Damages recovered.

First, In relation to Lands recover'd, Two Things are considerable:

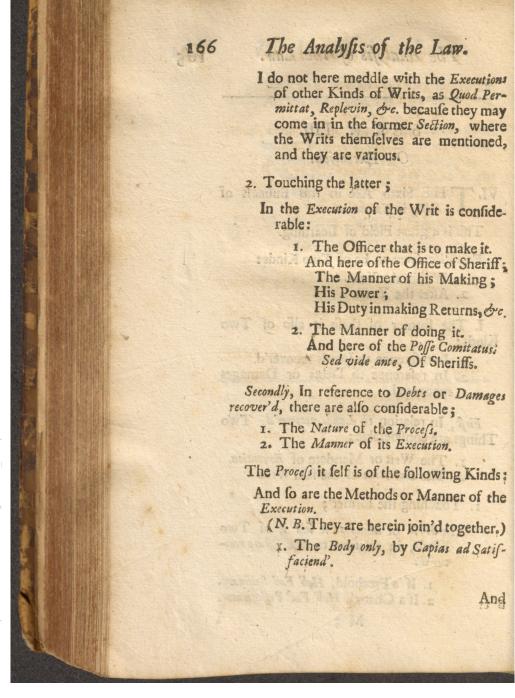
- I. The Writ or Mandate of Execution.
- 2. The Execution of the faid Writ.
- 1. Touching the former;

The Writ or Mandate it self is of Two Kinds, in relation to the Estate recover'd:

- 1. If a Freehold, Hob' Fac' Seisinam.
- 2. If a Chattel, Hab' Fac' Possessionem.

M 3

I



And here of Capias's: (Where it lies;) How executed; When with, and when without, breaking open Doors.

What Kind of Execution it is: Whether without Satisfaction.

And here of Non omittas: As also of Escapes;

2. Goods only, by Fieri Facias.

And here of that Learning: How, upon what, and by whom, it is executed. And whether a Return be neceflary.

3. Profits of Lands only, by Levari Facias.

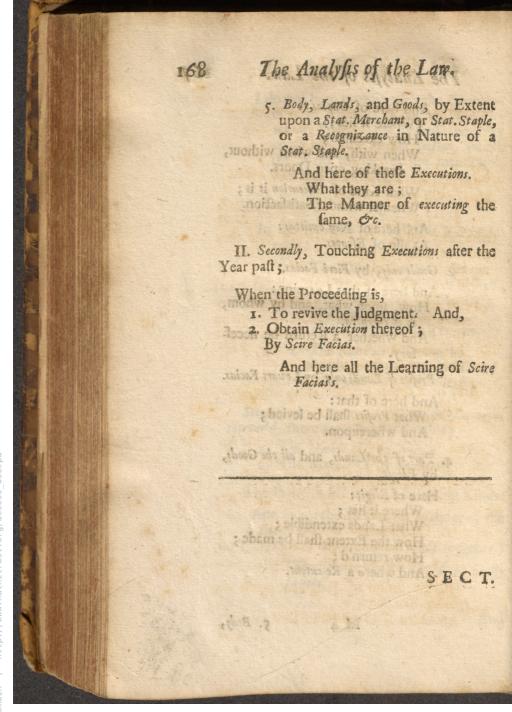
And here of that: What Profits shall be levied; And whereupon.

4. Part of the Lands, and all the Goods, by Elegit.

Here of Elegit: Where it lies; What Lands extendible; How the Extent shall be made; How return'd; And where a Re-extent.

M 4

5. Body,



# SECT. LIV.

Of Redress of Injuries, by Error, &c.

VII. Lastly, I come to Remedies that Perfons have, to be reliev'd against those Proceedings (aforesaid), in case they have just Cause so to be.

And they are these, viz.

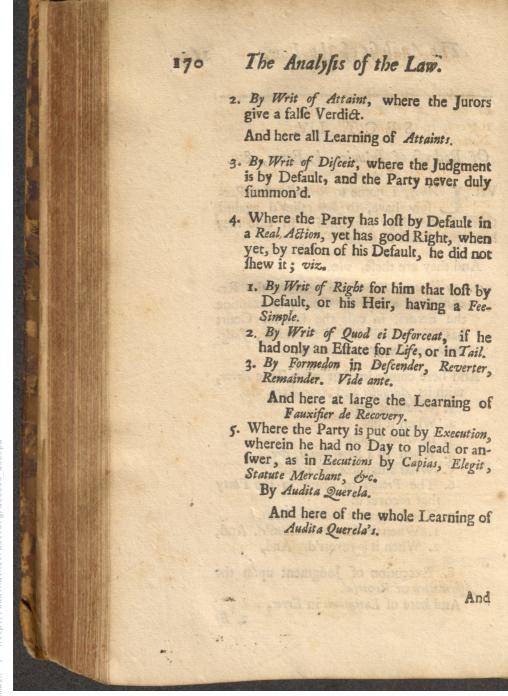
the Errors, in case the inferior Court has erred in Point of Proceeding, Judgment, or Execution awarded.

And here comes in that great Title Error, with its Adjuncts and Appendixes, viz.

- 1. Where it lies.
- 2. When it lies.
- 3. In what Court.
- 4. When 'tis a Supersedeas, &c.
- 5. What affignable for Error.
- 6. The Process to bring in the Party that recover'd.
- 7. The Judgment therein, both,
  - 1. When the former is affirm'd. And,
  - 2. When it is revers'd. And,
  - 8. Execution of Judgment upon the Affirmation or Reversal.

And here of Executions in Error.

2. By



# The Analysis of the Law.

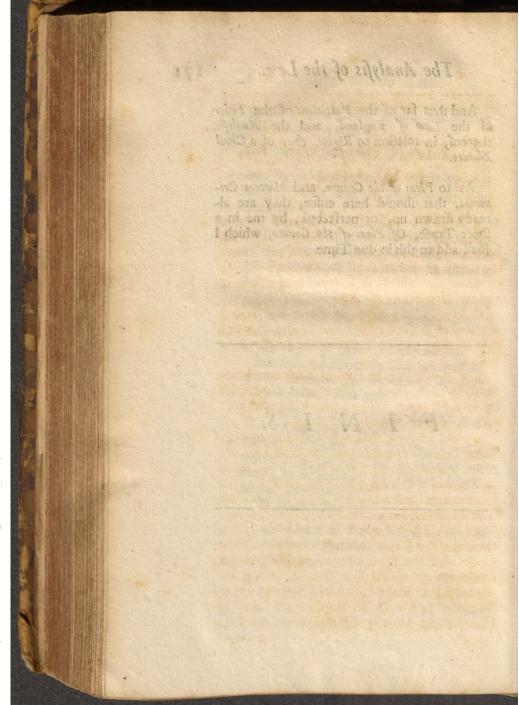
171

And thus far of the Partitions of the Titles of the Law of England, and the Analysis thereof, in relation to Rights, &c. of a Civil Nature.

As to Pleas of the Crown, and Matters Criminal, that should here ensue, they are already drawn up, or perfected, by me in a short Tract, Of Pleas of the Crown, which I shall add to this in due Time.

# FINIS.

Generated on 2023-03-20 16:46 GMT / https://hdl.handle.net/2027/uiuc Public Domain / http://www.hathitrust.org/access\_use#pd



# BOOKS printed for J. Walthoe.

r. CASES argued and decreed in the High Court of Chancery: The Second Edition, carefully corrected from the many gross Errors of the former Edition; to which are added, References to the ancient and modern Books of the Law.

2. Cowell's Interpreter of Words and Terms used either in the Common or Statute Laws of this Realm, and in Tenures and Jocular Cu-

ftoms.

3. Puffendorff of the Law of Nature and Nations, in Eight Books. Translated into English by several Hands. The Second Edition, cor-

rected, and improved with Notes.

4. Sir Orlando Bridgman's Conveyances: Being Select Precedents of Deeds and Instruments concerning the most considerable Estates in England. Drawn and approved by that Honourable Person in the Time of his Practice. The Fourth Edition, with large Additions.

5. Sir Edward Lutwyche's Entries: Containing also a Report of the Resolutions of the Court of divers Exceptions taken to Pleadings, and upon other Matters in Law arising for the most Part in the Court of Common-Pleas, from the 34 Car II. to the Second Year of Her present Majesty Queen Anne. In Two Volumes;

and all the Judges. of the Judges. 7. Keble's Reports in Three large Volumes. Plates. 7. Harris, D. D. the Royal Society.

Volumes; approved of by the Lord Keeper

6. Reports of divers Cases in Pleas of the Crown, adjudged and determin'd in the Reign of the late King Charles II. with Directions for Justices of the Peace and others. Collected by Sir John Reyling Knt. late Lord Chief Justice of the Court of King's-Bench, from his original Manuscript. To which is added, the Reports of Three Modern Cases, viz. Armstrong and Liste, the King and Plumer, the Queen and Maugridge, with the Allowance

8. A General History of England from the earliest Account of Time, to the Death of King William; in Three Volumes in large

Folio, with the Effigies of all the Kings and Queens curioully engraven on large Copper

9. Lexion Technicum: Or, An Universal English Dictionary of Arts and Sciences, explaining not only the Terms of Art, but the Arts themselves. In Two Volumes. By

10. A Parallel of the ancient Architecture with the modern, in a Collection of Ten principal Authors who have written upon the Five Orders. The Second Edition, with large Additions. By 7. Evelyn Elq; Fellow of

11. A Geographical Dictionary, representing the present and ancient Names and States of all the Countries, Kingdoms, Provinces, remarkable Cities, Univerfities, Ports, Towns,

Moun-

Mountains, Seas, Streights, Fountains, and Rivers, of the whole World; their Distances, Longicudes, and Latitudes. Begun by Edmund Bobun Esq; The Fourth Edition. Price 12 s.

12. The Natural History of Oxfordshire, being an Essay towards the Natural History of England. By Robert Plott, L. L. D. late Keeper of the Assmolean Musaum, and Professor of Chymistry in the University of Oxford.

13. The Gentleman's Recreations, in Three Parts: The First contains a short and easie Introduction to all the Liberal Arts and Sciences, &c. The Second treats of Horsemanship, Hawking, Hunting, Fowling, Fishing, Agriculture, &c. done from the most authentick Authors, with great Enlargement. The Third is a compleat Body of all our Forest, Chace and Game Laws, as they are at this Time. Illustrated with near an Hundred large Copper-Cuts. The Second Edition corrected, with near half of Additions.

14. Ductor Dubitantium: Or, The Rule of Confcience in all her general Measure, serving as a great Instrument for the Determination of Cases of Conscience. The Fourth Edition. By feremy Taylor, D. D. Chaplain in Ordinary to King Charles I. and late Bishop of

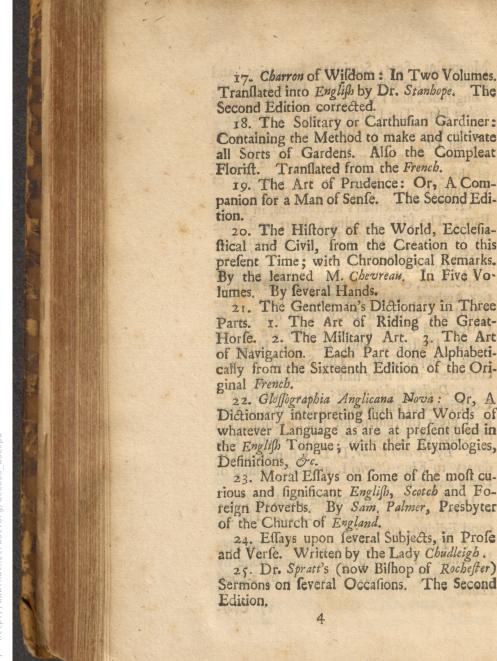
Down and Connor.

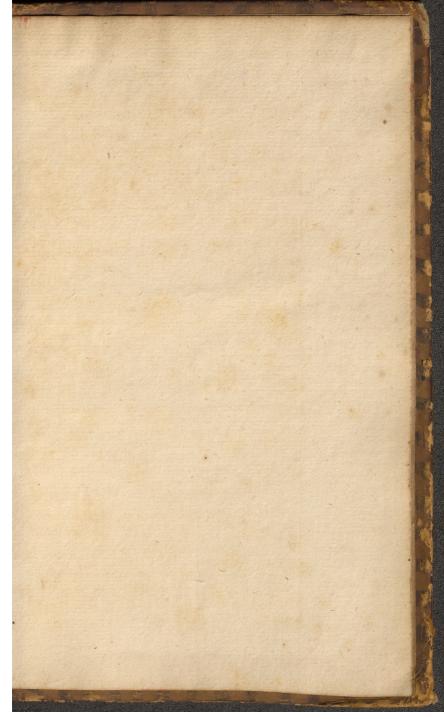
15. A Commentary on the Book of Common-Prayer. By W. Nichols, D. D. The Se-

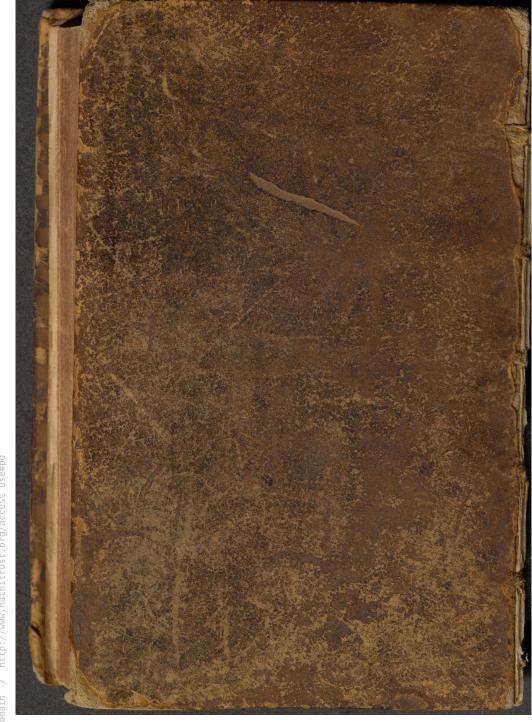
cond Edition, corrected.

16. The Roman History compleat, in Five Volumes. The Two first Volumes done by Mr. Echard; and the Three last by a good Hand.

17. Char-







Digitized by UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN